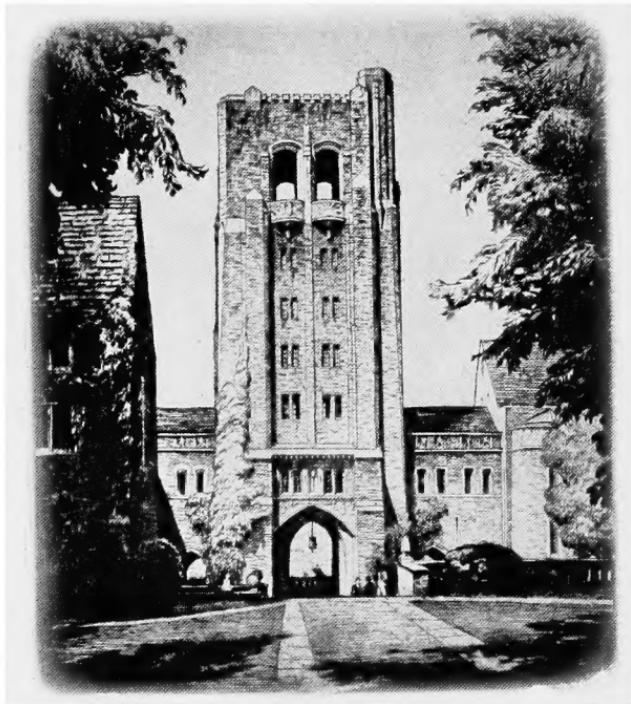


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# HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS

BY ROGER W. COOLEY, LL. M.

PROFESSOR OF LAW, UNIVERSITY OF NORTH DAKOTA

AUTHOR OF "BRIEFS ON THE LAW OF INSURANCE," "ILLUSTRATIVE  
CASES ON PERSONS AND DOMESTIC RELATIONS," "ILLUS-  
TRATIVE CASES ON INSURANCE," "ILLUSTRATIVE  
CASES ON DAMAGES," AND "ILLUSTRATIVE  
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## PREFACE

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IN 1904 the Hornbook on Public Corporations by Judge Henry H. Ingersoll was published. After the lapse of nearly ten years it was deemed advisable to bring out a new edition and the work of preparing it was intrusted to the present writer. As the work of revision progressed, however, it was thought desirable, in order to make the new book conform to suggestions offered by legal educators, to alter the original scope and plan of the book, and treat only the subject of Municipal Corporations. With that purpose in view five chapters of the original book, treating of quasi public corporations, were omitted, and the remaining portions of the book rearranged and in some portions expanded, to the end that a more logical and adequate treatment of the narrower subject might be attained. In the preparation of present text free use has been made of the material contained in Judge Ingersoll's excellent work, a few chapters of which have been retained in substantially their original form.

The object of this handbook is to present in concise form the general principles of the law of Municipal Corporations. As a very large proportion of this branch of the law is statutory, it is impossible, within the limits of a single volume, to treat the subject exhaustively or with even an approach to completeness. The aim has been rather to set forth clearly and concisely those fundamental principles which must be and are applied in any attempt to formulate and construe the law of municipal corporations as found in the various state-law of municipal corporations as found in the various statutes.

Though designed especially for the use of students—the arrangement and mode of treatment being dictated more or less by the writer's experience in teaching the subject—it is believed that the handbook will commend itself to the practitioner because of its concise statement of fundamental principles and full citation of leading authorities and illustrative cases.

ROGER W. COOLEY.

University of North Dakota School of Law,  
December, 1913.

(v)\*



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## CHAPTER I

### CORPORATIONS—PUBLIC AND PRIVATE

1. Corporations in General.
2. Kinds of Corporations.
3. Nature of Corporations.
4. Public Corporations—Definition.
5. Same—Classification.
- 6-7. Municipal Corporations—Distinguishing Elements.

### CORPORATIONS IN GENERAL

1. The nature of a corporation is set forth in the following standard definitions from acknowledged authorities:
  - (a) "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."<sup>1</sup>
  - (b) "It is a legal institution devised to confer upon the individuals of which it is composed powers, privileges, and immunities which they would not otherwise possess, the most important of which are con-

<sup>1</sup> Chief Justice Marshall in the celebrated Dartmouth College Case,  
<sup>4</sup> Wheat. (U. S.) 518-675, 4 L. Ed. 629, wherein the nature of corporations was elaborately considered, and it was established that the charter of a private corporation was an inviolable contract, under the Constitution of the United States, art. 1, § 10.

tinuous legal identity or unity, and perpetual or indefinite succession under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members.”<sup>2</sup>

(c) “It is a collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form, and invested by the policy of the law with the capacity of acting in several respects as an individual—particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or of the powers conferred upon it either at the time of its creation, or at any subsequent period of its existence.”<sup>3</sup>

The three foregoing statements of the nature and qualities of a corporation are the ones most familiar to the modern student. The first is by the great Chief Justice, and gives terse expression to the fundamental ideas of a corporation. It is not a natural, but an artificial, being or person; it cannot be seen, nor touched, nor recognized by any other human sense; it is a creature of the law, existing only by its authority,<sup>4</sup> and recognized and respected by it alone.

The second definition is by the recognized master of the law of municipal corporations in America.<sup>5</sup> It is fuller, more

<sup>2</sup> Judge Dillon, in volume 1, § 30, *Commentaries on Law of Municipal Corporations* (5th Ed.)—the standard textbook on that subject.

<sup>3</sup> 1 Kyd, Corp. 13—a work which has held high repute for a century in both England and America.

<sup>4</sup> Agreement of members cannot alone make a corporation; the express consent of the state is necessary. Clark, *Priv. Corp.* §§ 4, 12–18; 1 Thomp. *Priv. Corp.* § 35; *Hoadley v. Essex County Com'rs*, 105 Mass. 526; *Stowe v. Flagg*, 72 Ill. 397; *Franklin Bridge Co. v. Wood*, 14 Ga. 80.

<sup>5</sup> Judge Dillon's *Commentaries on the law of Municipal Corpora-*

comprehensive, and more satisfactory to the lawyer. It calls attention not only to the characteristics emphasized by Chief Justice Marshall in his vivid and sententious definition, but also to other characteristics, viz.: It is composed of individuals;<sup>6</sup> it has powers, privileges, and immunities not common to natural persons;<sup>7</sup> the members may die, but the corporation continues as a perpetual unity unaffected by their death.<sup>8</sup>

Still fuller and yet more satisfactory than either of the American definitions is that of the great English author, Kyd, the earliest writer in our language upon this topic. Judges, professors, and practitioners have generally united in commending this as a most accurate, practical, and complete definition, and remarkable as found in the first treatise on the subject. In addition to the ideas of this artificial person found in the other definitions, Mr. Kyd has herein specified the chief powers of a corporation,<sup>9</sup> such as the taking and holding and transferring of property, the contracting of obligations and

tions, published originally in 1872—the first American work on this subject—came instantly into professional and judicial favor, and is justly entitled to be called “authority.” The references to this work, unless otherwise indicated, are to the fourth edition.

<sup>6</sup> 1 Thomp. Priv. Corp. § 7; Clark, Priv. Corp. § 1, Append. p. 644; 1 Coke, Inst. 202, 250; 2 Kent, Comm. 267, 268; People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620; Hightower v. Thornton, 8 Ga. 492, 52 Am. Dec. 412. The corporation sole, a favorite of English courts for the protection of the crown and of ecclesiastics, has been recognized in several of the United States. Day v. Stetson, 8 Me. 365; Governor v. Allen, 8 Humph. (Tenn.) 176; Inhabitants of First Parish in Brunswick v. Dunning, 7 Mass. 447; Roman Catholic Archbishop of San Francisco v. Shipman, 79 Cal. 288, 21 Pac. 830; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649. But corporations sole are rare in America, and not increasing in number or favor.

<sup>7</sup> Lord Coke, reporting the opinion of Manwood, C. B., says: “They are invisible, immortal, having no conscience or soul.” And in our day the responsible members are not liable personally.

<sup>8</sup> 1 Thomp. Priv. Corp. § 10; Clark, Priv. Corp. § 15; State v. Stormont, 24 Kan. 686; Fuller v. Trustees of Plainfield Academic School, 6 Conn. 543; Fairchild v. Masonic Hall Ass'n, 71 Mo. 526.

<sup>9</sup> These are sometimes distinguished as essential attributes and nonessential incidents. Clark, Priv. Corp. §§ 6, 7.

transaction of business, the suing and being sued like a natural person; the idea of certain powers, privileges, and immunities adapted to its object; and the specific purpose of its creation.

Blackstone divided corporations<sup>10</sup> into aggregate and sole, according to the number composing the body; into ecclesiastical and lay, according to the character of the persons composing them; and into civil and eleemosynary, according to the uses they were intended to subserve; and this classification is still generally recognized and utilized in England. But it is not profitable for us to discuss whether the division is now exactly correct in theory, for certainly it is of little present practical use in America.

### KINDS OF CORPORATIONS

2. Primarily all corporations are divided into two great classes, public and private; public being those created for the public use, and private being created for private objects.

Another class, known as quasi public corporations, combines the elements of both public and private. Though organized for private profit, they are compelled by law or contract to render public service.

The distinction between public and private corporations is not only of theoretical interest, but of great practical importance. Upon this pivot is often made to turn the liability of the corporation for the torts and contracts of its agents, and the powers and privileges of the body. Nor is the subject free from difficulty, either upon reason or authority. It is easy to understand that counties, cities, and towns, and other public bodies upon which the legislature has conferred definite powers, to be exercised for public purposes only, are public corporations; but whether banks, colleges, schools, and hospitals, designed and operated for the public welfare, are pub-

<sup>10</sup> 1 Bl. Comm. 469-471.

lic or private, is matter of disagreement in our American courts; and there are decisions which declare a municipal corporation to have a private character,<sup>11</sup> and others holding railway companies and grain elevators to be public corporations quoad hoc.<sup>12</sup>

It is declared by the Supreme Court of Georgia that "a bank organized by the government for public purposes is a public corporation if the whole of the stock and all interest in it reside in the government."<sup>13</sup> But the three neighboring states of North Carolina, South Carolina, and Alabama, by their Supreme Courts, declared the contrary doctrine;<sup>14</sup> and to this view the United States Supreme Court inclines in at least two cases.<sup>15</sup> In the matter of schools and colleges the law was declared by that tribunal in the celebrated Dartmouth College Case, in 1819, to be that a corporation is not necessarily public because it has been established for the purpose of general education or charity. If the foundation be private, though under government charter, the corporation is private, however extensive the uses may be to which it is devoted, either by the

<sup>11</sup> *Bailey v. Mayor, etc., of City of New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Macauley v. Mayor, etc., of City of New York*, 67 N. Y. 602; *City of Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133; *Oliver v. City of Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Lloyd v. Mayor, etc., of City of New York*, 5 N. Y. 369, 55 Am. Dec. 347; *People ex rel. Board of Park Com'rs v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

<sup>12</sup> *Munn v. Illinois*, 94 U. S. 113-126, 24 L. Ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 24 L. Ed. 97. These are commonly known as the "Granger Cases," in which was maintained and enlarged the old legal doctrine enunciated by Lord Hale, that, "when private property is affected with a public interest, it ceases to be juris privati only." 1 Harg. Law Tracts, 78. It has also been applied to water companies, *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; and to gas companies, *State ex rel. Attorney General v. Ironton Gas Co.*, 37 Ohio St. 45.

<sup>13</sup> *Cleaveland v. Stewart*, 3 Ga. 283.

<sup>14</sup> *State Bank v. Clark*, 8 N. C. 36; *Bank of State v. Gibbs*, 3 McCord (S. C.) 377; *Bank of State v. Gibson's Adm'rs*, 6 Ala. 814, 816.

<sup>15</sup> *Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 907, 6 L. Ed. 244; *Bank of Kentucky v. Wister*, 2 Pet. (U. S.) 318, 7 L. Ed. 437.

bounty of the founder, or the nature and objects of the institution; and so, if the making of profit is the purpose of a corporation, it is a private corporation, though it may be engaged in the service of the public.<sup>16</sup> In the Planters' Bank Case, above cited, the state of Georgia was both the proprietor and a corporator of the bank, but not the exclusive owner. In the Kentucky Bank Case, the state was not a corporator, but was the exclusive owner of the stock of the bank. In both cases the bank was held by the Supreme Court of the United States to be a private corporation. The conflict in these decisions on the subject of banks doubtless results from the application to stock corporations of the remarks of the Justices of the Supreme Court of the United States, in the Dartmouth College Case, upon the qualities and attributes of public and private corporations, which were intended to be applied only to nonstock corporations, such as was Dartmouth College, where private profit was not the object of the corporation.

The decided preponderance of authority is that, where profit-making is the object of the corporation, it is private;<sup>17</sup> if it perform public functions, engage in public service, or exercise any sovereign power, it becomes a quasi public corporation.<sup>18</sup>

<sup>16</sup> *Ten Eyck v. Delaware & R. Canal Co.*, 18 N. J. Law, 200, 37 Am. Dec. 233; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *People v. Forrest*, 97 N. Y. 97; *Commonwealth v. Lowell Gaslight Co.*, 12 Allen (Mass.) 75.

<sup>17</sup> *Clark, Priv. Corp.* 29; 1 *Thomp. Priv. Corp.* §§ 24, 27. Corporations are private if created for private gain, even though supposed by the Legislature to promote the public interest. 1 *Dill. Mun. Corp.* § 53. As to the various kinds of private corporations, see *Clark on Corporations*, §§ 10, 11.

<sup>18</sup> *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. Law, 148, 69 Am. Dec. 565; *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318; *Ten Eyck v. Delaware & R. Canal Co.*, 18 N. J. Law, 200, 37 Am. Dec. 233; *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30; *Logwood v. President, etc., of Planters' & Merchants' Bank of Huntsville, Minor (Ala.)* 23. Every stock corporation is a private corporation, though it be quasi public because of its functions, as a railroad or a canal company. So, also, are

### NATURE OF CORPORATIONS

3. A corporation aggregate, whether public or private, consists of
- (a) A collection of natural persons.
  - (b) A legal body including those persons, and yet separate and distinct from them, endowed by law with certain rights, powers, and franchises.

To avoid the confusion often arising in the minds of persons inexperienced in the practical operation of a corporation it is of first importance that the legal body, existing only in contemplation of law, shall be kept separate and distinct from the persons of the members composing it.<sup>19</sup> ¶ The corporation cannot exist without members. Human beings, with minds and souls, to organize, establish, control, direct, and use the powers which the state confers upon the corporate body, are essential to its existence. Until the persons authorized have breathed the breath of life into the body of the charter, there is no corporation.<sup>20</sup> If the members all die or remove from the territory, leaving no successors to exercise these powers or maintain these rights, the corporation is at an end.<sup>21</sup> ¶ The charter is a separate, distinct, and necessary part of the or-

nonstock corporations erected upon a private foundation, though their functions are public. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

<sup>19</sup> Clark, *Priv. Corp.* §§ 5-9.

<sup>20</sup> *State ex rel. Weir v. Dawson*, 16 Ind. 40; *Willis v. Chapman*, 68 Vt. 459, 35 Atl. 459; *Yeaton v. Bank of Old Dominion*, 21 Grat. (62 Va.) 593; *Ellis v. Marshall*, 2 Mass. 269, 3 Am. Dec. 49. There must be an acceptance of the charter before corporate life can begin. *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

<sup>21</sup> 1 Bl. Comm. 485; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1; *Arthur v. President, etc., of Commercial & R. Bank of Vicksburg*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; 2 Kent, Comm. 308, 309; *President, etc., of Bridge over River Lehigh v. Lehigh Coal & Nav. Co.*, 4 Rawle (Pa.) 9, 26 Am. Dec. 111; *Philips v. Wickham*, 1 Paige (N. Y.) 590.

ganism, but it is not the corporation. The persons authorized by law to assume its rights, powers, and franchises are equally essential to its existence.<sup>21</sup> But until the two have been united by the action of the persons under and within the powers of the charter, the corporation is only a potentiality. After the union of the two, and as long as the charter and members both live, the corporation exists.<sup>22</sup> The members exercise the corporate powers and hold the corporate property and perform the corporate functions in the corporate name, and the corporation is said to be a "going concern." But with either the death of all the members or the loss of the charter the essential union of members and body is dissolved, and the legal fiction is at an end; the corporation no longer exists.<sup>23</sup>

#### *Termination—Members*

The charter may expire of its own limitation, or it may be terminated by an act of the law, legislative or judicial;<sup>24</sup> the individuals composing the corporation may terminate their relation to it by death, surrender, or severance of membership, and, the life being out of the legal body, nothing but the dry shell remains.<sup>25</sup> And yet, essential as these two parts are to the corporate existence, the body and its members have also, in the view of the law, a separate and distinct existence. In its relations with other persons and with the state, in the exercise of its powers and control of its property it is only the corporation that acts; everything is done in the corporate name; the obligations contracted, the liabilities incurred, the conveyances made, the functions exercised, are all in the name

<sup>22</sup> Smith v. Silver Valley Mining Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Clark Priv. Corp. §§ 5, 6; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473.

<sup>23</sup> Bacon v. Robertson, 18 How. (U. S.) 480, 15 L. Ed. 499; Mason v. Pewabic Mining Co., 66 Fed. 396, 13 C. C. A. 532.

<sup>24</sup> 1 Dill. Mun. Corp. (5th Ed.) §§ 330, 334.

<sup>25</sup> People ex rel. Redman v. Wren, 4 Scam. (Ill.) 275; Smith v. Smith, 3 Desaus. (S. C.) 557.

of the corporation; and thus it is an artificial person.<sup>26</sup> But the individual members, though essential to the corporate existence do not own the property, do not make the contracts, do not commit torts, nor incur the liability of the corporation.<sup>27</sup> They retain their own separate personality; each one is a separate and distinct person, with no corporate power, franchise, or property vested in him. It is the collective body of corporators having the right to these powers and franchises and this property of the corporation, that control, govern, and direct its operation.<sup>28</sup> However powerful in thought, will, or money any one member may be—however dominant his influence and habit—he is not the corporation; and, even though it should happen that he own every share of stock or every acre of land in it, he could not in his own name convey any portion of the corporate property; and the corporation may sue one of its own members, and the member may sue the corporation, on either contracts or torts, even though they affect or concern the affairs of the corporation.<sup>29</sup>

### *Corporate Unity*

And yet, separate and distinct as the members and the body are, the members are one; and that one is the corporation.

<sup>26</sup> Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Williamson's Syndics v. Smoot, 7 Mart. O. S. (La.) 34, 12 Am. Dec. 494; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

<sup>27</sup> Clark, Priv. Corp. §§ 558, 559, 564, 565. But in two notable cases involving the "corporation trust questions" the courts of New York and Ohio have pronounced judgment against corporations for wrongs done by the members. People v. North River Sugar Refining Co., 121 N. Y. 582, 74 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.

<sup>28</sup> Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Durfee v. Old Colony & F. R. R. Co., 5 Allen (Mass.) 230, 242; Dudley v. Kentucky High-school, 9 Bush (Ky.) 578.

<sup>29</sup> Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Waring v. Catawba Co., 2 Bay (S. C.) 109; Rogers v. Danby Universalist Soc., 19 Vt. 187; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

"The most peculiar and strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial, individual existence."<sup>30</sup> This quality is aptly expressed by Blackstone in the following simile: "All the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law—a person that never dies; in like manner as the river Thames is still the same river, but the parts which compose it are changing every instant."<sup>31</sup> In a leading New York case it was declared by Chief Justice Nelson "that the essences of a corporation consist in a capacity to have perpetual succession, and a special name and an artificial form, to take and grant property, contract obligations, sue and be sued by its corporate name as an individual, and to receive and enjoy in common, grants, privileges, and immunities."<sup>32</sup> These expressions used generically in regard to corporations are especially applicable to private corporations; and yet, as we shall see hereafter, the same general principles and rules may apply to both classes.

#### PUBLIC CORPORATIONS—DEFINITION

4. A public corporation is a corporation created by the state for public purposes only, as an instrumentality to increase the efficiency of government, supply the public wants, and promote the public welfare.

This class of corporations includes not only the municipal corporation, but also agencies of government, called "quasi corporations," whose objects are not the making of private

<sup>30</sup> Warner v. Beers, 23 Wend. (N. Y.) 103.

<sup>31</sup> 1 Bl. Comm. 468.

<sup>32</sup> Thomas v. Dakin, 22 Wend. (N. Y.) 9. Cf. Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457.

profit nor supplying the wants of the members.<sup>33</sup> All corporations are supposed to be created for the public good; otherwise the legislature, acting for the public, would not enact laws to bring them into existence; and formerly the popular idea was that the public is interested in every corporation created by it through its legislative authority. The members of a corporation were supposed to be able and willing to return something to the state in consideration for the favors conferred upon them by the incorporation. In Virginia and North Carolina the Supreme Courts in early cases made bold to declare that no act of incorporation ought ever to be passed by the legislature but in consideration of services to be rendered to the public.<sup>34</sup> The same view found frequent expression or recognition also in the decisions of other states, but this judicial opinion as to matters of public policy in respect to corporations has not controlled the legislative departments of our American states. In the appropriate exercise of their co-ordinate powers with regard to the public policy of the state, the Legislatures, during the latter half of the nineteenth century, in some states gradually, in others rapidly, seemed generally to have reached their own conclusion that corpora-

<sup>33</sup> Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; Soper v. Henry County, 26 Iowa, 267; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Ten Eyck v. Delaware & R. Canal Co., 18 N. J. Law, 200, 37 Am. Dec. 233; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Regents of University v. McConnell, 5 Neb. 423. The fact that the state has an interest in it does not make the corporation public, Bank of U. S. v. Planters' Bank, 9 Wheat. 904, 6 L. Ed. 244; nor the fact that part of its support comes from the state, Cleaveland v. Stewart, 3 Ga. 283; nor that it renders service to the state, Thomson v. Union P. R. Co., 9 Wall. (U. S.) 579, 19 L. Ed. 792.

See, also, Raleigh & G. R. Co. v. Davis, 19 N. C. 451; Alabama & T. R. R. Co. v. Kidd, 29 Ala. 221; McCune v. Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278; People v. Morris, 13 Wend. (N. Y.) 325; Bennett's Branch Imp. Co.'s Appeal, 65 Pa. 242; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318.

<sup>34</sup> MILLS v. WILLIAMS, 33 N. C. 558, Cooley, Cas. Mun. Corp. 1.

tions are a public benefit per se. They have accordingly been concocted and created for nearly every imaginable purpose, public and private.<sup>85</sup>

### SAME—CLASSIFICATION

5. Public corporations are divisible into three classes:

- (a) Quasi corporations.
- (b) Municipal corporations.
- (c) Quasi public corporations.

A quasi corporation is an involuntary political or civil division of the state, created by general law to aid in the administration of government.

A municipal corporation is a body politic and corporate created by law by the incorporation of the inhabitants of a city, town, or district as an agency of the state to regulate and administer the local affairs thereof.

A quasi public corporation is a private corporation organized to make profit by rendering public service or supplying public wants.

The word "quasi," used in the first and last of the foregoing definitions, is the word usually employed by courts and authors in describing these two kinds of public corporations, and has been so long used as to be recognized as a part of our legal nomenclature, foreign and technical though it be. Literally rendered, a quasi corporation is an almost corporation, and

<sup>85</sup> Judge Thompson (1 Thomp. Priv. Corp. § 132), giving extracts from the laws of eight representative states, showing the purposes for which corporations are permitted, describes such legislation as "fantastic patchwork." Judge Dillon (1 Dill. Mun. Corp. [5th. Ed.] § 56) quotes approvingly the language of an Illinois court, that corporations "have become the greatest means of state and national prosperity," and further says that "public and municipal corporations in all the states and territories are constantly created and universally adopted as part of the ordinary machinery of government."

a quasi public corporation is an almost public corporation. To the profession, therefore, a quasi corporation is an organization vested with some of the powers and faculties of a corporation, and yet defective in some essential features. The term "quasi corporations" is used, therefore, to describe bodies loosely organized, and possessing only a part of the usual corporate powers and attributes. Quasi corporations represent the lower order of corporate life, and vary in their functions according to the purposes which they are intended to serve. Such are counties, townships, school districts, and the like.<sup>86</sup>

<sup>86</sup> The word "quasi" has been too long and generally used to be readily abandoned, but both the quasi corporations might appropriately be included under the term "civil corporations," for civil corporations they surely are. Blackstone says the civil corporations are such as are erected for a variety of temporal purposes, and instances the king, the town and borough corporations, church wardens, college of physicians, and the universities of Cambridge and Oxford. 1 Bl. Comm. \*471.

Bouvier defines civil corporations to be "such as afford facilities for obtaining loans of money, making canals, turnpikes, roads, and the like." Title "Corporations."

Judge Dillon declares "civil corporations are of different grades or classes, but in essence and nature they must all be regarded as public." 1 Dill. Mun. Corp. (5th Ed.) § 37.

It would thus not only simplify the definitions of public corporations, but also comport with the ideas expressed by these standard authors, to say that public corporations are divided into two classes, municipal and civil; the municipal corporation including the strict corporation for urban government, and the civil embracing all other kinds of public corporations.

Quasi corporations are recognized and treated of in the following cases: BOARD OF COM'RS OF HAMILTON COUNTY v. MIGH-ELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; Wehn v. Gage County Com'rs, 5 Neb. 494, 25 Am. Rep. 497; Talbot County Com'rs v. Queen Anne's County Com'rs, 50 Md. 245; White v. Commissioners of Chowan, 90 N. C. 437, 47 Am. Rep. 534; School Dist. No. 11 v. Williams, 38 Ark. 454; ASKEW v. HALE COUNTRY, 54 Ala. 639, 25 Am. Rep. 730, Cooley, Cas. Mun. Corp. 355; Soper v. Henry County, 26 Iowa, 264; Harris v. School Dist., No. 10, in Canaan, 8 Fost. (28 N. H.) 58; Scales v. Ordinary of Chattahoochee County, 41 Ga. 225; Rogers v. People ex rel. Brewer, 68 Ill. 154; Beach v. Leahy, 11 Kan. 23; Hamilton County v. Garrett, 62 Tex. 602; Riddle v. Proprietors of Merrimack River Locks and Canals, 7 Mass. 187, 5 Am. Dec. 35; Adams v. President, etc., of Wiscasset

A quasi public corporation describes one which is organized under the statutes providing for the creation of private corporations, and therefore is to be treated as such at all times, save only with regard to its public franchise and functions, such as the power of eminent domain or the duty of common carrier.<sup>87</sup> To this class belong railways, elevators, canals, and the numerous public service corporations of our cities.<sup>88</sup>

The municipal corporation is the only representative of the strict and complete public corporation; it is represented in our cities, boroughs, towns, and villages, whether incorporated under general or special laws. As intimated above counties, towns, townships, and school districts are not municipal corporations, but only quasi corporations, with limited statutory powers and liabilities, and not subject to the doctrines of the law peculiarly applicable to municipal corporations. This phrase will be used herein in its strict and proper sense, as referring to chartered and organized local governments of towns and cities.

## MUNICIPAL CORPORATIONS — DISTINGUISHING ELEMENTS

### 6. The municipal corporation is a perfect public corporation, established under and by virtue of a sovereign act of legislation, uniting the people and land with-

Bank, 1 Me. 363, 10 Am. Dec. 88; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; Commonwealth v. Green, 4 Whart. (Pa.) 531, 598; Cole v. Fire Engine Co. in East Greenwich, 12 R. I. 202; Polk v. Plummer, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; Levy Court v. Coroner, 2 Wall. (U. S.) 501, 17 L. Ed. 851.

<sup>87</sup> Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 164, 24 L. Ed. 94; State ex rel. Attorney General v. Ironton Gas Co., 37 Ohio St. 45.

<sup>88</sup> Clark, Priv. Corp. §§ 10, 11, p. 30; Thomp. Priv. Corp. § 27; Head v. Curators of State University, 47 Mo. 220; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318; Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law, 148, 69 Am. Dec. 565.

in a prescribed boundary into a body corporate and politic for the purposes of local and self-government, and invested with the powers necessary therefor.

#### 7. States and territories are not municipal corporations.

A municipal corporation is perfect as contradistinguished from the imperfect quasi corporation, the county, district, or township, loosely organized under general law into a governmental agency for local administration of the state authority within a subdivision of the state,<sup>39</sup> which in strictness cannot be said to be incorporated, though the statutes of many states declare them to be corporations. The municipal corporation is duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town, or district incorporated by proper legislation and administration.<sup>40</sup> It is lawfully and fully empowered so to do.<sup>41</sup> Prac-

<sup>39</sup> BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; Talbot County Com'rs v. Queen Anne's County Com'rs, 50 Md. 245; Manuel v. Commissioners of Cumberland County, 98 N. C. 9, 3 S. E. 829; Schultes v. Eberly, 82 Ala. 242, 2 South. 345; Cathcart v. Comstock, 56 Wis. 590, 14 N. W. 833; Rogers v. People ex rel. Brewer, 68 Ill. 154; Beach v. Leahy, 11 Kan. 23; Pulaski County v. Reeve, 42 Ark. 54; State ex rel. Chouteau v. Lefingwell, 54 Mo. 458; Soper v. Henry County, 26 Iowa, 264; Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332.

<sup>40</sup> Cuddon v. Eastwick, 1 Salk. 143; Heller v. Stremmel, 52 Mo. 309; People v. Morris, 13 Wend. (N. Y.) 325; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; East Tennessee University v. Mayor, etc., of City of Knoxville, 6 Baxt. (Tenn.) 166; State ex rel. Sherman v. Common Council of City of Milwaukee, 20 Wis. 87.

<sup>41</sup> Cooley, Const. Lim. (6th Ed.) p. 138; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65, and State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; PEOPLE ex rel. LE ROY v. HURLBUT, supra; People ex rel. Board of Park Com'rs v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; Taylor v. City of Carondelet, 22 Mo. 105; Heland v. City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670; State v. Tryon, 39 Conn. 183; Mason v. City of Shawneetown, 77 Ill. 533; Starr v.

tically it may fall far short of perfection, but in the eye of the law it is the only ideal of a complete public corporation. Its object is public,<sup>42</sup> though incidents connected with it may be of private nature,<sup>43</sup> and so far forth it is subject to the rules of liability controlling private corporations in the ownership of property,<sup>44</sup> while the quasi public corporation is of a private nature and object, with incidents only that are public.<sup>45</sup> The municipal is the only corporation standing as the representative of the purely public corporation.

It is established under law;<sup>46</sup> i. e., it may be created by special charter enacted by the general assembly, without pop-

City of Burlington, 45 Iowa, 87; Bearden v. City of Madison, 73 Ga. 184; Milne v. Davidson, 5 Mart. (N. S.) (La.) 409, 16 Am. Dec. 189.

<sup>42</sup> 1 Thomp. Priv. Corp. 22; Dean v. Davis, 51 Cal. 406; People v. Morris, 13 Wend. (N. Y.) 325; Appeal of Bennett's Branch Imp. Co., 65 Pa. 242; Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215.

<sup>43</sup> Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Jones v. City of New Haven, 34 Conn. 1; Commonwealth v. City of Philadelphia, 132 Pa. 288, 19 Atl. 136; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36.

<sup>44</sup> Jones v. City of New Haven, 34 Conn. 1; Brumm's Appeal (Pa.) 12 Atl. 855; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Grogan v. City of San Francisco, 18 Cal. 590; Webb v. Mayor, etc., of City of New York, 64 How. Prac. (N. Y.) 10; Nichol v. Mayor, etc., of Town of Nashville, 9 Humph. (Tenn.) 252; People v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; United States v. Baltimore & O. R. Co., 17 Wall. (U. S.) 332, 21 L. Ed. 597.

<sup>45</sup> Hannibal & St. J. R. Co. v. Marion County, 36 Mo. 294; Goodnow v. Board of Com'rs of Ramsey County, 11 Minn. 31 (Gil. 12); Louisville & N. R. Co. v. Davidson County Court, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; Granger v. Pulaski County, 26 Ark. 37; Ray County v. Bentley, 49 Mo. 236; Laramie County v. Albany County, 92 U. S. 307, 23 L. Ed. 552. But see Stanislaus County ex rel. Smith v. Myers, 15 Cal. 33; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; State ex rel. Attorney General v. Ironton Gas Co., 37 Ohio St. 45.

<sup>46</sup> Elliott, Mun. Corp. §§ 12, 13; Clark, Priv. Corp., Appendix; People v. Stout, 23 Barb. (N. Y.) 349; People ex rel. v. City of Butte,

ular expression or action from the inhabitants of the territory, as well as by their request or consent.<sup>47</sup> Indeed, municipalities have been incorporated in direct antagonism to the expressed wish of the people.<sup>48</sup> Or it may be voluntarily organized by the residents of a specified territory under general incorporation laws, enacted for such purpose, and authorizing the erection of a municipality by such means.<sup>49</sup> In the first case the charter is the test and measure of the granted powers; in the latter they are to be found in the general corporation statutes. The difference between the two is only in the

<sup>47</sup> Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; State v. Curran, 12 Ark. 321; Taylor v. Commissioners of Town of Newberne, 55 N. C. 141, 64 Am. Dec. 566; Smith v. People ex rel. Malone, 154 Ill. 58, 39 N. E. 319.

<sup>48</sup> Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330; Blessing v. City of Galveston, 42 Tex. 641; Morford v. Unger, 8 Iowa (8 Clarke) 82; Clarke v. Rogers, 81 Ky. 43; BERLIN v. GORHAM, 34 N. H. 266, Cooley, Cas. Mun. Corp. 15; People ex rel. Redman v. Wren, 5 Ill. (4 Scam.) 269; People v. Morris, 13 Wend. (N. Y.) 325; State ex rel. Dome v. Wilcox, 45 Mo. 458; Smith v. McCarthy, 56 Pa. 359; Alcorn v. Hammer, 38 Miss. 652; State v. Steunenberg, 5 Idaho, 1, 45 Pac. 462; In re Narbeth Borough, 16 Pa. Co. Ct. R. 29; De Hart v. Atlantic City, 62 N. J. Law, 586, 41 Atl. 687.

<sup>49</sup> Elliott, Mun. Corp. § 14. "The erection of such a corporation is in truth simply the creation of a new instrumentality of government." Elliott, Roads & S. p. 313; People ex rel. v. City of Butte, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; Bristol v. Town of New Chester, 3 N. H. 524; State v. Curran, 12 Ark. 321; People ex rel. Redman v. Wren, 5 Ill. (4 Scam.) 269; Coles v. Madison County, 1 Ill. (Breese) 154, 12 Am. Dec. 161; Warren v. Mayor and Aldermen of Charlestown, 2 Gray (Mass.) 84; People v. Morris, 13 Wend. (N. Y.) 325; Spring Valley Waterworks v. City of San Francisco, 22 Cal. 434; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488; State ex rel. Fremont, E. & M. V. R. Co. v. Babcock, 25 Neb. 709, 41 N. W. 654; New York Fire Dept. v. Kip, 10 Wend. (N. Y.) 267; Proprietors of Land of Southold v. Horton, 6 Ill. (N. Y.) 501; Morford v. Unger, 8 Iowa, 82.

<sup>49</sup> Von Phul v. Hammer, 29 Iowa, 222; Kimball v. Town of Rosendale, 42 Wis. 407, 24 Am. Rep. 421; City of Wyandotte v. Wood, 5 Kan. 603; Thomas v. Incorporated Village of Ashland, 12 Ohio St. 124; City of Lafayette v. Jenners, 10 Ind. 70; State v. Steunenberg, 5 Idaho, 1, 45 Pac. 462.

mode of organization. When fully incorporated, both are equally perfect public corporations.

It is a "sovereign act of legislation," because in this country no other power in the state may create the corporation.<sup>50</sup> The power may not be delegated to any inferior body.<sup>51</sup> The General Assembly or Legislature of the state alone possesses this inherent creative power.<sup>52</sup> No court or county board or oth-

<sup>50</sup> Doe ex dem. Chandler v. Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732; United States v. Home Ins. Co., 22 Wall. (U. S.) 99, 22 L. Ed. 816; Clarke v. Rogers, 81 Ky. 43; MILLS v. WILLIAMS, 33 N. C. 558, Cooley, Cas. Mun. Corp. 1; People v. President, etc., of Manhattan Co., 9 Wend. (N. Y.) 351.

<sup>51</sup> City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; McCowell v. Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653; Lauenstein v. City of Fond du Lac, 28 Wis. 336; City of East St. Louis v. Wehrung, 50 Ill. 28; Mayor, etc., of City of Baltimore v. Scharf, 54 Md. 499; Danforth v. Mayor, etc., of City of Paterson, 34 N. J. Law, 163; Ruggles v. Inhabitants of Nantucket, 11 Cush. (Mass.) 433. Also, see City of Oakland v. Carpentier, 13 Cal. 540, and Matthews v. City of Alexandria, 68 Mo. 115, 30 Am. Rep. 776, where the cities empowered to build and regulate wharves undertook to confer the right upon lessees or contractors. 1 Thomp. Priv. Corp. § 110; STATE v. SIMONS, 32 Minn. 540, 21 N. W. 750, Cooley, Cas. Mun. Corp. 12; In re Incorporation of Village of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; State v. Armstrong, 3 Snead (Tenn.) 634. The power to organize or perform ministerial functions under the law authorizing incorporation may be vested in courts or official boards. Ex parte Chadwell, 3 Baxt. (Tenn.) 98; Greeneville & Paint Rock Narrow Gauge R. Co. v. Johnson, 8 Baxt. (Tenn.) 332; Heck v. McEwen, 12 Lea (Tenn.) 97; State v. Leatherman, 38 Ark. 81; Clark, Priv. Corp. p. 41, note; Cooley, Const. Lim. (6th Ed.) pp. 137, 248.

<sup>52</sup> Judge Cooley (Cooley, Const. Lim. [6th Ed.] 141) says: "The prevailing doctrine in the courts appears to be that, except in those cases where, by the Constitution, the people have not expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration." "Municipal corporations can only exist under and by virtue of legislative enactment." City of Guthrie v. Wylie, 6 Okl. 61, 55 Pac. 103.

See Hope v. Deaderick, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; Jameson v. People ex rel. Nettleton, 16 Ill. 257, 63 Am. Dec. 304; Atkinson v. Marietta & C. R. Co., 15 Ohio St. 21; Mayor, etc., of City

er authority is competent for this legislative function.<sup>53</sup> It is a sovereign act of legislation, in whatever form.

It unites the people and the land, for neither people nor land alone can constitute a municipality. Like a home, it requires a union of both elements—the land to give it body, and men to give it spirit and life. Both are essential to its creation and to its existence.<sup>54</sup> It has a prescribed boundary, because the limits of the municipality must be fixed and definite, that its territorial jurisdiction may not be uncertain or doubtful.<sup>55</sup>

The body is corporate and politic because it is authorized and organized as an agency of the state for public uses and the public good.<sup>56</sup>

of *Mobile v. Moog*, 53 Ala. 561; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *Town of New Boston v. Town of Dunbarton*, 12 N. H. 409; *City of Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 529.

<sup>53</sup> *McCulloch v. State of Maryland*, 4 Wheat. (U. S.) 316, 424, 4 L. Ed. 579; *Mayor, etc., of City of Mobile v. Moog*, 53 Ala. 561; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Mayor, etc., of City of Morristown v. Shelton*, 1 Head (Tenn.) 24; *Greeneville & Paint Rock Narrow Gauge R. Co. v. Johnson*, 8 Baxt. (Tenn.) 332; *State v. Jennings*, 27 Ark. 419. But see, also, *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Blanchard v. Bissell*, 11 Ohio St. 96; *People v. Carpenter*, 24 N. Y. 86; *Devore's Appeal*, 56 Pa. 163; *Taylor v. City of Ft. Wayne*, 47 Ind. 274.

<sup>54</sup> *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *City of Philadelphia v. Fox*, 64 Pa. 180; *Lowber v. Mayor, etc., of City of New York*, 5 Abb. Prac. (N. Y.) 325; *Clarke v. City of Rochester*, 24 Barb. (N. Y.) 446; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 659; *City of Galesburg v. Hawkinson*, 75 Ill. 152, 156; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; *State ex rel. Loy v. Mote*, 48 Neb. 683, 67 N. W. 810; *State ex rel. Childs v. Village of Fridley Park*, 61 Minn. 146, 63 N. W. 613. It is the citizens of the city and not the common council who constitute the "corporation." *Clarke v. City of Rochester*, 14 How. Prac. (N. Y.) 193, 5 Abb. Prac. 107; *Lowber v. Mayor, etc., of City of New York*, 5 Abb. Prac. (N. Y.) 325; *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36.

<sup>55</sup> *Gilchrist's Appeal*, 109 Pa. 600; *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Cutting v. Stone*, 7 Vt. 471; *Hamilton v. McNeil*, 13 Grat. (54 Va.) 389; *People v. Carpenter*, 24 N. Y. 86.

<sup>56</sup> *East Tennessee University v. Mayor, etc., of City of Knoxville*,

It is local because,<sup>57</sup> unlike the ancient cities,<sup>58</sup> its powers and franchises are to be confined to its territorial limits, or lands immediately contiguous, which are sometimes included for police and sanitary purposes.<sup>59</sup>

It is for self-government, because the idea of foreign domination and exclusion of the people of a city or town from the administration of its internal affairs is repugnant to the fundamental conception of a municipality and the genius of American institutions.<sup>60</sup> "Municipium" means a free town, and

<sup>56</sup> Baxt. (Tenn.) 166; City of Philadelphia v. Fox, 64 Pa. 185; Heller v. Stremmel, 52 Mo. 309; 1 Dill. Mun. Corp. § 23.

<sup>57</sup> In People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202, Cooley, J., said: "While it is a fundamental principle in the state, recognized and perpetuated by express provisions of the Constitution, that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government, the Constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state, from considerations of good policy, as well as those which pertain to the local benefit and local desires." People v. Morris, 13 Wend. (N. Y.) 325; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107.

<sup>58</sup> Liddell, Rome, c. 27. Babylon, Thebes, Athens, Corinth, Carthage, and Rome, though cities, merely, were great ruling powers in the ancient world. The early life of the Christian era was entirely urban. Guizot, Hist. Civ. lect. II.

<sup>59</sup> People v. Bennett, '83 Mich. 457, 47 N. W. 250; Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; Ogden City v. McLaughlin, 5 Utah, 387, 16 Pac. 721; Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520. But see Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601. And concerning disposition of sewage beyond corporate limits, see McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. See East Tennessee University v. Mayor, etc., of City of Knoxville, 6 Baxt. (Tenn.) 166; Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221, 30 Am. Rep. 545; Dingley v. City of Boston, 100 Mass. 544.

<sup>60</sup> Smith, Mun. Corp. § 32; BOARD OF COMRS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; Cuddon v. Eastwick, 1 Salk. 143; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley Cas. Mun. Corp. 36; People v. Morris, 13 Wend. (N. Y.) 325; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15

"municeps" a free citizen thereof, as those ideas were conceived in the Roman Empire. This idea persisted in Italy, Germany, France, and England through the Middle Ages, and despite the Hapsburg, Bourbon, and Stuart tyrannies.<sup>61</sup>

A city not governed by its own laws and ordinances in its domestic concerns is not a municipality, either by history or etymology. It must have powers, or it cannot be a government—powers sufficient to authorize it to make its own laws and enforce them.<sup>62</sup> It is an imperium in imperio—a favorite in our complex American system of checks and balances and home rule.

### *States and Territories*

States and territories are not municipal corporations. A consideration of the essential elements of the municipal corporation makes this matter so plain as to seem unnecessary for statement; but, in view of certain judicial expressions and loose statements of authors, the essential difference should be noticed. By the state here is meant a self-existent body of persons united together in one political entity, organized under a distinct government possessing sovereign power recognized and upheld as supreme.<sup>63</sup> It is used generically, and

Am. Rep. 202; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65.

<sup>61</sup> Hallam's History Middle Ages, c. 8; 1 Hume's England, App. II; Norton's History of London, c. 20; 1 Stephen's Eng. Const. c. 7.

<sup>62</sup> Hopkins v. Mayor of Swansea, 4 Mees. & W. 621; State v. Tryon, 39 Conn. 183; Mason v. City of Shawneetown, 77 Ill. 533; Heland v. City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670; Starr v. City of Burlington, 45 Iowa, 87; Taylor v. City of Carondelet, 22 Mo. 105; City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16) 90 Am. Dec. 278; Markle v. Town Council of Akron, 14 Ohio, 586; Trigally v. Mayor, etc., of City of Memphis, 6 Cold. (Tenn.) 382.

<sup>63</sup> Bouv. Law Dict. subject "State." "A multitude of people united together by a communion of interest, and by common laws, to which they submit with one accord." Burlamaqui, Politic. Law, c. 5; Georgia v. Stanton, 6 Wall. (U. S.) 65, 18 L. Ed. 721; Chisholm v. Georgia, 2 Dall. (U. S.) 457, 1 L. Ed. 440; Des Moines County v. Harker, 34 Iowa, 84; Delafield v. Illinois, 2 Hill (N. Y.) 159; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227.

includes, therefore, not only the states of the federal union, but the government of the United States itself. The state exists by itself and for itself, and without the consent of any one except the people thereof. It is not created or established under an act of legislation, or by the consent of any superior power. In America, at least, it derives its power exclusively from the consent of the people.<sup>64</sup> This consent is essential, and some lawful expression of it must be given to authorize its creation. If it have not the attribute of sovereignty, it is not a state.<sup>65</sup> That is the power which creates corporations. It controls and dissolves them. This sovereign power is that which makes it a state, and not a corporation, which is a derivative creation, owing its existence and powers to the state.<sup>66</sup> It is, of course, not to be denied that in very many of their attributes, functions, and powers, the state and municipal corporation bear close resemblance;<sup>67</sup> and by one seeking resemblance only they might readily be mistaken for the same kind of political entity. But after tracing all these points of similarity, there still remains the distinguishing and ineradicable difference that one is creator and the other is creature.<sup>68</sup>

<sup>64</sup> See Declaration of Independence, first and second paragraphs.

<sup>65</sup> Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274.

But see State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; Dikes v. Miller, 25 Tex. Supp. 281, 78 Am. Dec. 571; President, etc., of Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; People v. City of St. Louis, 10 Ill. 351, 48 Am. Dec. 339.

<sup>66</sup> Ante, § 1; Thomp. Priv. Corp. §§ 1, 15, 35; Clark, Priv. Corp. §§ 4, 13 to 18, inc., Appendix.

<sup>67</sup> Delafield v. Illinois, 2 Hill (N. Y.) 159: "A state is a legal being, capable of transacting some kinds of business like a natural person." State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378. See Lowell, Stocks, § 2, where he says: " \* \* \* The parallel, indeed, between a state and a corporation, is very close."

<sup>68</sup> BERLIN v. GORHAM, 34 N. H. 266, Cooley, Cas. Mun. Corp. 15; President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; Hope v. Deaderick, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597.

A territory of the United States, by its very nature, belongs to a distinct class of political bodies. It is not self-existent.<sup>69</sup> The consent of the population is not required to its creation, organization, or political existence. It is created by a sovereign act of legislation,<sup>70</sup> but its area is too extensive for a municipality. Under congressional grant it may possess the great powers of local legislation, including the creation of corporations, public and private.<sup>71</sup> But the judicial and executive departments are administered by appointees of the federal government, so that the power of local self-government in the territory is partial only.<sup>72</sup> The territorial powers of legislation usually granted by Congress are entirely subject to the congressional will.<sup>73</sup> Congress may at any time abrogate the territorial laws. It may itself enact laws for the territorial government in any or all of its details.<sup>74</sup> It may grant charters to corporations, private or municipal, and may create new quasi corporations, and divide or consolidate existing ones.<sup>75</sup> Congress possesses over the territories all the power

<sup>69</sup> Vincennes University v. Indiana, 14 How. (U. S.) 273, 14 L. Ed. 416; Miners' Bank v. Iowa, 12 How. 1, 13 L. Ed. 867; Brittle v. People, 2 Neb. 198.

<sup>70</sup> Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539.

<sup>71</sup> People ex rel. v. City of Butte, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; Deitz v. City of Central, 1 Colo. 323.

<sup>72</sup> Territory v. Guyott, 9 Mont. 46, 22 Pac. 134.

<sup>73</sup> Rogers v. Burlington, 3 Wall. (U. S.) 662, 18 L. Ed. 79; Riddick v. Amelin, 1 Mo. 5; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539.

<sup>74</sup> In the case of Riddick v. Amelin, 1 Mo. 5 (decided in 1821, about the time of the admission of Missouri to statehood), the objection was made that such a Legislature (territorial) was not sovereign, and that nothing short of sovereign power could create a corporation. The answer given was that Congress could give and had given the power to legislate on such subjects. In an act of Congress (Act March 2, 1867, c. 150, § 1, 14 Stat. 426; Rev. St. U. S. § 1889), it was provided that “\* \* \* the legislative assemblies of the several territories of the United States shall not \* \* \* grant private charters or especial privileges. \* \* \*” In Seattle v. Tyler, Wash. T. 1877, this section was held by Chief Justice Lewis, of that territory, to extend to and embrace municipal corporations within its prohibition.

<sup>75</sup> 1 Dill. Mun. Corp. (4th Ed.) § 38; CITY OF GUTHRIE v. TER-

which the state possesses over public corporations, quasi and municipal, and thereby the territory is given a much closer resemblance than the state to municipal corporations.<sup>76</sup> The act of Congress under which it is authorized, commonly called the "Organic Act," is its charter of existence; and, like the municipality, the territory may exercise only such powers as are granted by the charter.<sup>77</sup> But it has none of the common-law qualities of a corporation which inhere in the municipal corporation, and could, at most, be called with semblance of propriety a quasi corporation. It is, however, a peculiarly American political entity of statutory origin, and is as distinctly characterized by its name "territory" as the municipal corporation is by the term "municipality."

#### *Historical*

The American municipal corporation, though differing in many respects from its archetype, the English municipality of the eighteenth century, has in general the same corporate character and attributes, and its law may be studied to advantage in the light of municipal history. The history of the development of the municipality, which had its origin under Roman rule, in the ancient Italian towns, of its struggles for existence during the storm and stress of the Feudal Ages, of the sturdy resistance of burgher and citizen against the tyranny and exaction of lord and king, of the undying love of home rule among Germanic peoples, and especially of the struggle of these freedom-loving communities in England with the despotism of the house of Stuart, which claimed to rule by divine right, is interesting and instructive; but the limits

RITORY, 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841, Cooley, Cas. Mun. Corp. 30, 52; Alger v. Hill, 2 Wash. 344, 27 Pac. 922; Deitz v. City of Central, 1 Colo. 332.

<sup>76</sup> Riddick v. Amelin, 1 Mo. 5; Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539.

<sup>77</sup> Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046; Murphy v. Ramsey, 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47.

of this handbook do not permit of extended notice.<sup>78</sup> Suffice it here to say that the elements which contribute love of home rule to the municipality are of German origin, and those contributing to it power as an organism come from Rome. Uniting these two elements, we find the essentials of the municipality; its particular form, powers, and life are matters of environment. The town was alike the product and exponent of peaceful industry; it was also the prey of the conquering warrior. Municipal life had shown signs of considerable activity under the Saxon kings; but Norman conquest and Norman rule were repressive. The peaceful citizen was no match for the mailed warrior, and for a long time municipal life was low, unfruitful, and uninviting. The life which had before been seen in the streets of the cities and towns was then attracted to the feudal castle. Still the towns endured, and London never ceased to grow. Gradually they began to be recognized as holding the balance of power between contending kings and nobles, and the want of the one or the other for men and money afforded the towns their opportunity. Under the guilds the tradesmen and artisans had acquired both property and the habit of organization. These not only commanded respect, but gave them power to demand and obtain recognition and confirmation of their customary rights and privileges. Gradually they grew in importance, until in the thirteenth century Simon de Montfort summoned two citizens from each borough to sit in Parliament. Before the close of the following century this summons had become regular and habitual, and the cities, boroughs, and leading towns of England were as firmly established as were the shires in their right of parliamentary representation. At first these burghers were the staunch supporters of the king in his efforts to break the power of the great barons; but later, when the royal power under the Tudors and the Stuarts was overshadowing all other forces in the government, the instinct of self-

<sup>78</sup> For a concise account of the rise of municipalities see McQuillan, *Mun. Corp.* vol. 1, c. 1.

preservation led the towns to side with the yeomen and gentry in their struggle with absolutism, and thereby advanced their interests.

In early times every freeman settling in the borough and paying dues to it became thereby a burgher; but in the natural evolution of urban life money became the power, and the merchant guilds gradually grew to become municipal oligarchies. After a long strife these in turn had been succeeded by the trade companies. Besides their civic privileges and franchises, the boroughs had acquired civic property; and, consistently with the spirit of the age, the persons then in power in them obtained royal charters, conferring sole municipal power upon the existing burgesses and their successors, thereby excluding all immigrants and newcomers. Many of the towns consequently ceased to grow, and in later years some of them were almost abandoned by people; yet they retained their parliamentary representation, thus forming the famous "rotten borough" of the last century, of which Old Sarum was the type.

The special privileges and favors that a little borough thus had over its most prosperous and growing neighbors became a matter of such reproach that the Reform Parliament of 1832 abolished these pocket boroughs, which had dwindled into petty villages, controlled by neighboring landlords who appointed parliamentary members; and in 1835 the municipal corporation reform act restored to the people of the towns the municipal essence which had been enjoyed by the favored few within their limits for centuries. The towns, boroughs, and cities became veritable municipalities, self-government was restored to their people, and then began an era of prosperity among English cities which has continued to the present time.

As said above, the American municipality in its general aspects differs in some respects from those from which it sprung. This is especially noticeable in their advanced development of the principles of local self-government. One

instance of this is to be found in the self-chartered cities, a description of which will be found in a subsequent chapter.<sup>79</sup>

### *Commission Form of City Government*

Another and more noticeable development of municipal life is to be found in what is known as the "commission plan" of city government. The commission plan, as now in general operation throughout the United States, is a form of municipal government in which all of the powers of the municipality, both legislative and administrative, are unified in a single small elective board. The theory underlying it is that this unification of power in a few hands means a concentration of power and responsibility in the same hands; it is therefore a combination of efficiency and popular control of government; and, finally, as a result of the foregoing, this plan of government is democratic, and is in harmony with the letter and spirit of our institutions.

This plan marks a distinct departure from the traditional form of national, state, and city government, in which the separation of powers into three branches, legislative, executive, and judicial, was held to be the cardinal and indispensable principle. The American doctrine of "checks and balances," applied so repeatedly and ingeniously in the federal Constitution, very naturally percolated downward through state Constitutions and city charters. Here the doctrine took the form of a separation of power into three distinct branches, as mentioned above. With the coming of the new form of city government, this doctrine—once a part of our political religion—is likely to be classed as a superstition of the past.

The commission plan was first adopted in Galveston, Texas, in 1901, following the destruction of that city by storm and flood. The commission there in charge of the legislative and administrative work of the city consists of five men, elected at large instead of from wards or other subdivisions of the city. This board of five men appoints all other administrative of-

<sup>79</sup> See post, p. —.

ficers of the city. From Galveston the plan spread to other Texas cities, and then to neighboring states. At the end of ten years (June, 1911) 140 cities in 27 states had adopted this form. By June, 1913, 281 cities in 36 states were under this plan of government. Four of these cities are places of over 200,000 inhabitants.

With the spread of this plan has come many modifications in its details, so that an exact definition of the commission plan of government is impossible. In all cases, however, full power and responsibility are centered in a small elective board. This small board, elected at large, takes the place of the old city council, which was a large body, elected from definite wards or subdivisions of the city. The size of the commission varies from three to nine persons, but five is the usual number. The term of office is usually four years, but this also varies. The newer charters provide for the initiative, the referendum, the recall, a nonpartisan nomination and election, and a civil service appointive system. Some commissions now employ a city manager as their executive officer. In all cases the administrative work of the city is divided into departments, usually one department for each commissioner. The usual division is illustrated by the following from the Des Moines charter: (1) Department of Public Affairs; (2) Department of Accounts and Finance; (3) Department of Public Safety; (4) Department of Streets and Public Improvements; (5) Department of Parks and Public Property.

## CHAPTER II

### CREATION OF MUNICIPAL CORPORATIONS

8. Power to Create Municipal Corporations.
9. Same—Delegation of Power.
10. Same—What Bodies may Grant Charters.
11. Legislative Discretion.
12. Legislative Power—How Exercised.
13. Territory and Population.
14. Assent to Incorporation.
15. Corporations by Implication or by Prescription.
16. Validity of Incorporation—Compliance with Conditions.
17. Same—De Facto Corporations.
18. Same—How Tested.
19. What Constitutes Municipal Membership.
20. Classification of Municipalities.
21. Operation and Effect of Incorporation.

### POWER TO CREATE MUNICIPAL CORPORATIONS

8. The creation of a municipal corporation is the appropriate and exclusive function of sovereign legislative power.

That the creation of a municipal corporation is an act of sovereign legislative power results from the very nature of the corporation, its objects and functions. Every municipal corporation possesses certain elements of sovereign power, such as legislative power<sup>1</sup> and the power of eminent domain.<sup>2</sup> Neither of these powers can emanate from any source except the sovereign. In this country that sovereign may be either the federal government or the state.<sup>3</sup> Since a municipal corporation is clothed with power to exercise attributes of sover-

<sup>1</sup> Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505, 24 Am. Rep. 756.

<sup>2</sup> Mayor of Detroit v. Park Com'rs, 44 Mich. 602, 7 N. W. 180.

<sup>3</sup> Tied. Mun. Corp. § 22; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; Deitz v. City of Central, 1 Colo. 332.

eignty, that power must come from a sovereign; and hence the canon of corporation law that only the state<sup>4</sup> can create a municipal corporation.

Equally certain is it that this power to create municipal corporations belongs to the Legislature. All governmental power in this country inheres in the people. They organize their government by a Constitution, wherein they distribute the powers of government among three departments, the legislative, the executive, and the judicial. The granting of any right, power, or franchise pertaining to public matters—in other words, the granting of any portion of the sovereign power—is obviously a function of the legislative department as the representative of the people and not of the executive or judicial departments. A municipal corporation requires this grant of governmental authority as the essential condition of its being. Obviously, therefore, the grant of municipal powers to a corporation must come from the legislative department.<sup>5</sup>

#### SAME—DELEGATION OF POWER

9. The power to create a municipal corporation cannot, in the absence of constitutional provisions permitting it, be delegated by the Legislature to any inferior and subordinate tribunal or board.

While it is a fundamental principle of constitutional law that legislative power cannot be delegated to the courts, or

<sup>4</sup> The term "state" is here used, not in the sense of one of the United States, but as designating the power. See *City of Guthrie v. T. W. Harvey Lumber Co.*, 9 Okl. 464, 60 Pac. 247.

<sup>5</sup> *Hope v. Deaderick*, 27 Tenn. (8 Humph.) 1, 47 Am. Dec. 597; *People ex rel. Redman v. Wren*, 5 Ill. (4 Scam.) 269; *City of San Francisco v. Canavan*, 42 Cal. 541; *Redell v. Moores*, 63 Neb. 219, 88 N.W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431; *Allen v. Board of Trustees of City of Bakersfield*, 157 Cal. 720, 109 Pac. 486; *In re Village of Ridgefield Park*, 54 N.J. Law, 288, 23 Atl. 674; *Town of New Boston v. Town of Dunbarton*, 12 N.H. 409. See, also, *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107.

to any other tribunal, board, or officer,<sup>6</sup> the question whether the power of the Legislature to create municipal corporations may be delegated to either of the co-ordinate branches of the government, or to certain officers thereof, is one on which there is an apparent conflict of decisions. Certain courts have made some broad general statements which at first blush seem to support the principle that the power may be delegated to the courts;<sup>7</sup> but a careful examination of the opinions in these cases, with one or two doubtful exceptions,<sup>8</sup> will show that the general question was not involved in the case and that the court was required under the statute to exercise purely ministerial functions not calling for the exercise of any discretion.<sup>9</sup> In other cases, the real question involved was not that of the creation of the municipality, but that of the extension of its limits—a question, it is almost needless to say, involving entirely different principles.<sup>10</sup> On the other hand, whenever the question has been squarely presented, the courts have unqualifiedly held that a statute conferring on the court or other inferior body discretionary power to determine whether public interests will be subserved by the creation of a municipal corporation is invalid as a delegation of legislative power.<sup>11</sup>

<sup>6</sup> An exception in the case of delegation of power to municipalities to legislate for local purposes, see post, § 49.

<sup>7</sup> *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *Kirkpatrick v. State ex rel. McKee*, 5 Kan. 673; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *Morton v. Woodford*, 99 Ky. 367, 35 S. W. 1112.

<sup>8</sup> *Kirkpatrick v. State ex rel. McKee*, 5 Kan. 673.

<sup>9</sup> *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *Elder v. Incorporators of Central City*, 40 W. Va. 222, 21 S. E. 738.

<sup>10</sup> *Foreman v. Town of Marianna*, 43 Ark. 324; *City of Burlington v. Leebrick*, 43 Iowa, 252.

<sup>11</sup> *STATE v. SIMONS*, 32 Minn. 540, 21 N. W. 750, Cooley, Cas. Mun. Corp. 12; *People v. Town of Nevada*, 6 Cal. 143; *State v. Armstrong*, 3 Sneed (Tenn.) 634; *In re Incorporation of Village of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; *In re Village of Ridgefield Park*, 54 N. J. Law, 288, 23 Atl. 674; *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107.

The conflicting views, arising as they do from a careless interpretation of the decisions, may be reconciled by an application of the rule, laid down in several jurisdictions, that while the legislative function of creating a municipal corporation cannot be delegated, the Legislature may, where the mode of creating a municipal corporation is prescribed by a general law, properly leave to the courts the duty of deciding whether the proper steps have been taken under the law to bring the municipality into existence, and, having found that the requirements have been complied with, to declare the municipality incorporated.<sup>12</sup>

On principle it would seem unreasonable to distribute the powers of government among these co-ordinate departments, and yet allow one to exercise the functions of another, or to permit one to abrogate its powers by conferring them on another. But it is not regarded an unconstitutional delegation of power to provide that the question whether a community shall become incorporated shall be left to the vote of the people.<sup>13</sup>

#### SAME—WHAT BODIES MAY GRANT CHARTERS

##### 10. Municipal corporations may be created by

- (a) The Congress of the United States;
- (b) The state Legislatures;
- (c) Territorial Legislatures, when authorized by Congress.

##### *Power of Congress*

By the federal Constitution Congress is invested with "power to dispose of and make all needful rules and regulations

<sup>12</sup> Ford v. Town of North Des Moines, 80 Iowa, 628, 45 N. W. 1031; State ex rel. Gale v. Ueland, 30 Minn. 29, 14 N. W. 58; State v. Armstrong, 3 Sneed (Tenn.) 634; Kayser v. Trustees of Bremen, 16 Mo. 88; Elder v. Incorporators of Central City, 40 W. Va. 222, 21 S. E. 738; Barnes v. Minor, 80 Neb. 189, 114 N. W. 146; In re Alliance Borough, 19 Pa. Super. Ct. 178.

<sup>13</sup> People ex rel. Lore v. Nally, 49 Cal. 478; Guild v. City of Chi-

respecting the territory belonging to the United States,"<sup>14</sup> and "to exercise exclusive legislation over such district as may become the seat of the government of the United States."<sup>15</sup> Under this authority, Congress has erected the District of Columbia into a municipal corporation,<sup>16</sup> has organized territories, and also chartered cities and towns within their boundaries.<sup>17</sup> Under the express grant of powers contained in the Constitution, and the implied grant of those powers essential to the exercise of the express powers, the authority of Congress to create municipal corporations within the territories of the national government is obvious and beyond question. It has been upheld in several cases,<sup>18</sup> and will probably never again be questioned.

#### *Power Inherent in State Legislature*

The authority of the state Legislatures to incorporate cities and towns as indispensable agencies in the efficient administration of government is inherent and unquestioned.<sup>19</sup> As all legislative power not granted to Congress is reserved to the

cago, 82 Ill. 472; *Clarke v. City of Rochester*, 28 N. Y. 605; *People v. Fleming*, 10 Colo. 553, 16 Pac. 298.

<sup>14</sup> Const. U. S. art. 4, § 3, par. 2.

<sup>15</sup> Const. U. S. art. 1, § 8, par. 17.

<sup>16</sup> Act Feb. 21, 1871, c. 62, 16 U. S. Stat. 419; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637.

<sup>17</sup> Congress has rarely, if ever, exercised the power, except possibly in the case of Alaska.

<sup>18</sup> *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *Thomson v. Union P. R. Co.*, 9 Wall. (U. S.) 579, 19 L. Ed. 792; *California v. Central P. R. Co.*, 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, 1 L. Ed. 440; *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378, 1 L. Ed. 644; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204. See, also, *Vincennes University v. Indiana*, 14 How. (U. S.) 268, 14 L. Ed. 416; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Deitz v. City of Central*, 1 Colo. 323.

<sup>19</sup> *People v. City of Riverside*, 70 Cal. 461, 11 Pac. 759; *Town of New Boston v. Town of Dunbarton*, 12 N. H. 409; *Hope v. Deadrick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431.

states, it follows as a necessary consequence, that a state Legislature may enact any law not forbidden by the state or federal Constitution.<sup>20</sup>

The Legislatures, therefore, of the several states, have exclusive authority to create municipal corporations within the territorial limits of the states, in such manner and under such conditions as they may ordain.<sup>21</sup> The creation of municipal corporations is a legitimate exercise of the sovereign power vested in the Legislature of the state.

### *No Inherent Power of Creation in Territories*

The territories possess no inherent or sovereign power.<sup>22</sup> Such power as they have has been expressly granted to them by Congress, and may be withdrawn at any time.<sup>23</sup> The extent of this power in each territory is dependent upon the terms of the organic act under which it has been established,<sup>24</sup> or upon the general acts of Congress in regard to the territories, and the powers to be exercised by their Legislatures. Under an act authorizing the legislative assemblies of the several territories to pass general laws enabling persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, power was claimed for the territorial Legislature to incorporate a municipality;

<sup>20</sup> Cooley, Const. Lim. (6th Ed.) 104; People v. Draper, 15 N. Y. 532; People ex rel. Klokke v. Wright, 70 Ill. 388; Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625.

<sup>21</sup> State v. Jennings, 27 Ark. 419; Allen v. Board of Trustees of City of Bakersfield, 157 Cal. 720, 109 Pac. 486; People v. City of Riverside, 70 Cal. 461, 11 Pac. 759; People ex rel. Redman v. Wren, 5 Ill. (4 Scam.) 269; People v. Draper, 15 N. Y. 532; Hope v. Deadrick, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; In re Incorporation of Village of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638.

<sup>22</sup> Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046; United States v. Church of Jesus Christ of Latter-Day Saints, 5 Utah, 361, 15 Pac. 473.

<sup>23</sup> City of Seattle v. Yesler, 1 Wash. T. 571.

<sup>24</sup> First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. Ed. 1046.

but this power was denied as not necessarily implied from the organic act or the general act aforesaid.<sup>25</sup> The power has been implied, however, from a provision in the organic act granting to the territorial Legislature power over "all rightful subjects of legislation."<sup>26</sup> This general clause has been held sufficient to authorize the Legislature to create municipal and other corporations within the territorial limits for the purpose of increasing the efficiency of the territorial government, and supplying the public needs.<sup>27</sup> The power of the territorial Legislature has also been challenged upon the ground that this power was expressly granted to Congress, and; being thus delegated to it, cannot be delegated by it to another body. This amounts to a general challenge of any legislative power in a territory, and has been uniformly overruled by the courts.<sup>28</sup>

### LEGISLATIVE DISCRETION

#### 11. The exercise of the legislative function of creating municipal corporations is wholly within the discretion of the Legislature, and is not subject to the control of the judicial power.

As we have seen, the power of creating municipal corporations is vested exclusively in the Legislature. In some states the duty of providing for their creation is specifically enjoined upon that department by constitutional provision. For example, the Constitution of 1846 of the state of New York,

<sup>25</sup> City of Seattle v. Yesler, 1 Wash. T. 571.

<sup>26</sup> Burnes v. Mayor, etc., of Atchison, 2 Kan. 454; State v. Young, 3 Kan. 445; Deitz v. City of Central, 1 Colo. 323; Riddick v. Amelin, 1 Mo. 7; People v. City of Butte, 4 Mont. 179, 1 Pac. 414, 47 Am. Rep. 346; Wagner v. Hairis, 1 Wyo. 194.

<sup>27</sup> Deitz v. City of Central, 1 Colo. 323. In this case it was held that, though a Congress has no express power to erect municipal corporations in a territory, it has such authority by virtue of the sovereignty and proprietorship of the United States, and may confer it in the organic act on a territorial Legislature.

<sup>28</sup> Riddick v. Amelin, 1 Mo. 5.

provided:<sup>29</sup> "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages," etc. Similar provisions exist in the Constitutions of other states.<sup>30</sup>

#### *Legislative Discretion Conclusive*

The creation of a municipal corporation, being an act of legislation, is within the plenitude of legislative power.<sup>31</sup> Yet the failure or refusal of the Legislature to grant charters to towns, boroughs, or villages desiring them, as well as the enactment of such charters of incorporation for other communities not wishing to be incorporated, have occasionally undergone investigation by the courts. It sometimes happens that the persons residing in a certain community are eager, for certain reasons, to be incorporated, and they make application by petition to the Legislature for that purpose. That body, in the exercise of its undoubted discretion as to what laws it will enact, sometimes refuses to respond favorably to the petition and thus leaves the community in its unincorporated condition. This is conclusive upon the inhabitants.<sup>32</sup> No power resides in any other department of the government to compel the Legislature to enact any law. Having exercised its discretion, the matter is at an end, and no record is found of any case in which the aid of the courts was invoked to compel the legislative assembly to perform the constitutional duty so imposed upon it. In other instances, yielding to the solicitations of a few persons, or moved by some other consideration, the Legislature has granted charters to incorporate communities against the wish of a great majority of the people.

<sup>29</sup> Const. N. Y. 1846, art. 8, § 9.

<sup>30</sup> Const. Ohio, 1851, art. 13, § 6; Const. Mich. 1850, art. 15, § 13; Const. Wis. 1848, art. 11, § 3; Const. Cal. 1847, art. 4, § 37; Const. Or. 1857, art. 11, § 5; Const. Kan. 1859, art. 12, § 5; Const. N. D. 1889, § 130; Const. Neb. 1866, art. 8, § 4.

<sup>31</sup> Morford v. Unger, 8 Iowa, 82.

<sup>32</sup> Robinson v. Jones, 14 Fla. 256; Mattox v. State, 115 Ga. 212, 41 S. E. 709.

Occasionally it has happened that for violation of, or lack of conformity to, certain constitutional provisions prescribing the mode or condition of law-making, such charters have been held void by the courts;<sup>33</sup> but no case has been reported in which a court has assumed to enjoin the corporation from assuming and exercising its franchises for the reason that the Legislature had acted unwisely or had abused its discretion in granting the charter of incorporation. In states where there is no constitutional requirement for popular assent to the creation of a municipality, the power of the Legislature to create a municipal corporation is absolute,<sup>34</sup> and its discretion in enacting the law has been uniformly held to be not a subject for inquiry or review by the courts.<sup>35</sup> The Constitution has invested that department of the government with the discretion to decide for itself and for the people how and when it will exercise that function and perform this duty; and the Legislature having, in the exercise of its undoubted constitutional power, decided that a certain community ought to be incorporated, and enacted the requisite legislation to that end all inquiry as to the legislative motive or intention, except as appearing from the act itself is excluded from judicial consideration.<sup>36</sup> If the act is constitutionally passed, the corporation is lawfully created, and that is an end of the matter.

<sup>33</sup> *Town of Woodbury v. Brown*, 101 Tenn. 707, 50 S. W. 743.

<sup>34</sup> *City of San Francisco v. Canavan*, 42 Cal. 541; *Robinson v. Jones*, 14 Fla. 256; *People ex rel. Redman v. Wren*, 5 Ill. (4 Scam.) 269; *Hope v. Deaderick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Morford v. Unger*, 8 Iowa, 82; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Inhabitants of Gorham v. Inhabitants of Springfield*, 21 Me. 58; *Prince George's County Com'r's v. President, etc., of Village of Bladensburg*, 51 Md. 465; *BERLIN v. GORHAM*, 34 N. H. 266, Cooley, Cas. Mun. Corp. 15; *Blessing v. City of Galveston*, 42 Tex. 641; *State v. Haines*, 35 Or. 379, 58 Pac. 39.

<sup>35</sup> That such a question is not a judicial one, see *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107. See, also, *STATE v. SIMONS*, 32 Minn. 540, 21 N. W. 750, Cooley, Cas. Mon. Corp. 12. And see generally, as to delegation of power, ante, § 9.

<sup>36</sup> *Rumsey v. People*, 19 N. Y. 41; *Jameson v. People ex rel. Nettleton*, 16 Ill. 257, 63 Am. Dec. 304; *People v. Maynard*, 15 Mich. 463.

It must be conceded, however, that the arbitrary creation of a municipality in any community, regardless of the will of the inhabitants, though within the competency of the sovereign legislative power, is antagonistic to the republican spirit and repugnant to the principles of democracy.<sup>37</sup>

In some states, however, this power of creating involuntary municipal corporations does not exist in the Legislature. This is true of Ohio and Massachusetts, where there are constitutional provisions requiring the popular consent to the act of the Legislature before the corporation can come into existence. Many other states have embodied similar provisions in their Constitutions, and thus retained for the people of the towns the right of determining whether it is best for them to be incorporated, rather than submit this question to the legislative will. But where this constitutional provision is not found for the protection of the local communities, the will of the Legislature is supreme in the creation, alteration, and termination of municipal corporations.<sup>38</sup>

### LEGISLATIVE POWER—HOW EXERCISED

12. The Legislature, unless specially directed or limited by the Constitution, may, in its discretion, create municipal corporations
  - (a) By a special charter;
  - (b) By general legislation authorizing the organization of municipal corporations by the people on compliance with certain prescribed conditions;

<sup>37</sup> Cooley, *Const. Lim.* (7th Ed.) 166.

<sup>38</sup> *Thomas v. Richmond*, 12 Wall. (U. S.) 356, 20 L. Ed. 453; *Demarest v. Mayor, etc., of City of New York*, 74 N. Y. 161; *City of Lafayette v. Jenners*, 10 Ind. 70; *State v. Town of Tipton*, 109 Ind. 73, 9 N. E. 704; *President, etc., of City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law, 385; *BERLIN v. GORHAM*, 34 N. H. 266, Cooley, *Cas. Mun. Corp.* 15; *State ex rel. Hostetter v. Holden*, 19 Neb. 249, 27 N. W. 120; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *City of St. Louis v. Russell*, 9 Mo. 508; *City of St. Louis v. Allen*, 13 Mo. 400.

- (c) By general legislation authorizing certain municipalities to reorganize by framing and adopting their own charters.

The power vested in the Legislature to create municipal corporations may be exercised, either by a special act creating the municipality, and declaring its purpose, powers, rights, and functions, or by a general law authorizing the creation of municipal corporations by associations of individuals on their compliance with certain forms, requisites, and conditions precedent.

*Creation by Special Act*

The former method was the one in general use in this country during the last century, and, indeed, is quite commonly employed at present. It is not uncommon, when a community desires a charter granting peculiar corporate privileges, or when a Legislature thinks that a community should exercise corporate powers of a peculiar character or under special conditions, that a special act, called a "charter," is enacted for such community.<sup>39</sup>

This is especially true in regard to many of the larger cities, which exist under elaborate charters, specifying the franchises, privileges, and powers of the municipality, the various departments and officers thereof, the duties and powers of each, and, indeed, all other things supposed to be necessary to the well-being of the corporate community which can be enacted into a general law. This charter is the constitution of the municipality,<sup>40</sup> which under it may enact by-laws or ordinances not inconsistent with it or with the law of the land. This organic act generally specifies as corporators the names of a portion of the persons thus incorporated, and of the provisional officers of the municipality to hold the offices and exercise their

<sup>39</sup> Burke v. Jeffries, 20 Iowa, 145.

<sup>40</sup> Cooley, Const. Lim. (7th Ed.) pp. 265, 266; Platt v. City and County of San Francisco, 158 Cal. 74, 110 Pac. 304. And see MT. PLEASANT v. BECKWITH, 100 U. S. 514, 25 L. Ed. 699, Cooley, Cas. Mun. Corp. 74.

duties until the time fixed therein for a popular election. In those states wherein by Constitution it is necessary for the people to request or give assent to incorporation, such an act is nugatory until ratified, and the corporation remains in abeyance until such action was taken.<sup>41</sup> If never taken, of course, the corporation never comes into existence. But in the great majority of the states no popular request or ratification is provided for by Constitution, and the enactment of the law creates the corporation, and the authorized persons may proceed at once to the exercise of the corporate functions.<sup>42</sup>

Two methods of creation by special act are in vogue. Generally the Legislature, assuming the initiative, enacts the law by which the municipality is created and organized.<sup>43</sup> In this instance the act does not become operative as a law until all the constitutional requirements as to legislation have been complied with, including publication of the act.<sup>44</sup>

By the second method the community first formulates its charter, which is then submitted to the Legislature for adoption or rejection as a whole.<sup>45</sup> In this instance a formal act of legislation is not necessary, but a resolution of approval is sufficient.<sup>46</sup>

#### *Same—Constitutional Provision for Acceptance*

In some states it is provided by the Constitution that no community shall be erected into a municipal corporation without the assent of a majority of the qualified voters, expressed in a public election held for that purpose. In these states the Legislatures usually refuse to take action until an election has

<sup>41</sup> *State v. Haines*, 35 Or. 379, 58 Pac. 39.

<sup>42</sup> *People v. City of Butte*, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346; *People v. Morris*, 13 Wend. (N. Y.) 325; *Warren v. Mayor and Aldermen of Charlestown*, 2 Gray (Mass.) 84; *BERLIN v. GORHAM*, 34 N. H. 266, Cooley, Cas. Mun. Corp. 15. See, also, cases cited in note 34, p. 37.

<sup>43</sup> *Clark v. City of Janesville*, 10 Wis. 136.

<sup>44</sup> *Clark v. City of Janesville*, 10 Wis. 136.

<sup>45</sup> *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429.

<sup>46</sup> *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429.

been held and the popular choice expressed; but in some instances the organic act has been passed and popular assent given to the incorporation afterwards.<sup>47</sup> If the charter is granted before the election, it may contain a provision that it shall not be effective until the people shall have given their assent to the incorporation.

#### *Constitutional Inhibition of Creation by Special Law*

In some states the Constitution provides that no corporations shall be created by special law, and in these the question has arisen whether this inhibition includes municipal corporations. On this point the decisions are not uniform. The language employed in the various Constitutions is not identical, though the pivotal question in each case seems to be whether the general term "corporation" includes municipal corporations. In New York, Ohio, and Nebraska, the decisions are to the effect that the word "corporation" includes municipal corporations, as well as private.<sup>48</sup> On the other hand, in New Jersey, Rhode Island, and Tennessee, the holding is to the contrary.<sup>49</sup>

But, whatever view may be taken of the general provision forbidding the creation of corporations by special act, the question as to the creation of municipal corporations in that manner is determined in most states by an express provision in the Constitution forbidding the organization of municipal corporations except by general laws.<sup>50</sup> In these states no dis-

<sup>47</sup> President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; People ex rel. Caldwell v. Reynolds, 10 Ill. (5 Gilman) 1; Call v. Chadbourne, 46 Me. 206.

<sup>48</sup> Purdy v. People, 4 Hill, 384; State v. Pugh, 43 Ohio St. 98, 1 N. E. 439; Dundy v. Board of Com'rs of Richardson County, 8 Neb. 508, 1 N. W. 565; School Dist. No. 56 v. St. Joseph F. & M. Ins. Co., 103 U. S. 707, 26 L. Ed. 601; In re Corporate Powers of City of Council Grove, 20 Kan. 619.

<sup>49</sup> Pell v. Mayor, etc., of City of Newark, 40 N. J. Law, 71, 29 Am. Rep. 266; State v. District of Narragansett, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295; Luehrman v. Taxing District of Shelby, 2 Lea (Tenn.) 425; Williams v. Nashville, 89 Tenn. 487, 15 S. W. 364.

<sup>50</sup> See, for example, Const. Minn. art. 4, § 33; Const. N. D. 1889,

cretion is left to the Legislature as to the manner in which this important function shall be performed. The only method whereby it can discharge its duty is general legislation.

#### *Creation by General Laws*

The general laws enacted in the various states relating to the organization of municipal corporations, though in the same general form, vary greatly as to the details. Generally speaking, these acts prescribe the conditions upon which communities may become incorporated as villages, towns, or cities, and direct what steps must be taken to bring about the incorporation. Ordinarily the provisions of such acts are that, whenever the people residing within the boundaries containing a certain number of acres or square miles wish to become incorporated, they shall present to the court, or other tribunal authorized to act in the matter, a petition, signed by a specified number of the qualified electors residing within such tract,<sup>51</sup> which petition should show the boundaries of the territory proposed to be incorporated<sup>52</sup> and should be accom-

§ 130; Const. Mich. 1909, art. 8, §§ 20, 21; Const. Pa. art. 3, § 7; Const. Wis. amend. 4, § 31; Const. Ark. art. 12, §§ 2, 3. Similar provisions are found in the Constitutions of California, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wyoming.

<sup>51</sup> *Page v. Board of Supervisors*, 85 Cal. 50, 24 Pac. 607; *People ex rel. Boardman v. Town of Linden*, 107 Cal. 94, 40 Pac. 115; *State ex rel. Lee v. Jenkins*, 25 Mo. App. 484; *West End v. State*, 138 Ala. 295, 36 South. 423; *People ex rel. Saunier v. Stratton*, 33 Colo. 464, 81 Pac. 245; *State ex rel. Sutton v. Wiethaupt*, 150 Mo. App. 54, 129 S. W. 768. The persons signing such petition must be actual residents of the territory proposed to be incorporated, *State ex rel. Loy v. Mote*, 48 Neb. 683, 67 N. W. 810; or taxpayers, *State ex rel. Lee v. Jenkins*, 25 Mo. App. 484; or freeholders, *In re Pine Hill (Co. Ct.)* 33 N. Y. Supp. 181. It has, however, been held in Idaho (*Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126) that a resident and taxpayer of the county, though not of the territory to be incorporated, may appeal from a decision of the board of commissioners granting the petition if they believe the incorporation prejudicial to public interest.

<sup>52</sup> *State ex rel. Beasley v. Young*, 61 Mo. App. 494; *City of Wardner v. Pelkes*, 8 Idaho, 333, 69 Pac. 64.

panied by a map or plat of such territory.<sup>53</sup> Notice of the pendency of the proceedings should be given;<sup>54</sup> and if, upon a hearing of the application,<sup>55</sup> the court or board find that the requirements of the law have been complied with, it may enter an order declaring the community incorporated,<sup>56</sup> or, if an election is necessary, may submit the question to the qualified voters at the next general election, or a special election called for that purpose.<sup>57</sup> The final step is the promulgation of the order of the court or other tribunal,<sup>58</sup> or the proclamation of the result of the election, or the filing of the certificate

<sup>53</sup> People ex rel. v. New, 214 Ill. 287, 73 N. E. 362; State ex rel. Osborn v. Mitchell, 22 Ohio Cir. Ct. R. 208; State ex rel. Perrin v. Hoard, 94 Tex. 527, 62 S. W. 1054.

<sup>54</sup> People v. City of Riverside, 70 Cal. 461, 11 Pac. 759; State v. Oakland, 69 Kan. 784, 77 Pac. 694; State v. Frost, 103 Tenn. 685, 54 S. W. 986; State v. Town of Winter Park, 25 Fla. 371, 5 South. 818; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107. But notice is not necessary unless required by statute. Stembel v. Bell, 161 Ind. 323, 68 N. E. 589.

<sup>55</sup> Huff v. Preuitt (Tex. Civ. App.) 53 S. W. 844. As to the necessity for a hearing, see the statutes of the various states.

<sup>56</sup> State ex inf. Crow v. Fleming, 147 Mo. 1, 44 S. W. 758; State ex rel. Jackson v. Mansfield, 99 Mo. App. 146, 72 S. W. 471; In re Alliance Borough, 19 Pa. Super. Ct. 178; People ex rel. Russell v. Loyalton, 147 Cal. 774, 82 Pac. 620; State v. Bilby, 60 Kan. 130, 55 Pac. 843; Commonwealth Real Estate Co. v. City of South Omaha, 78 Neb. 368, 110 N. W. 1007.

The decision of the court or board designated to pass on the question of incorporation is generally held to be final and not subject to review. Hall v. De Armond, 46 Mo. App. 596; Campbell v. Wainright, 50 N. J. Law, 555, 14 Atl. 603; In re Borough of Taylor, 160 Pa. 475, 28 Atl. 934; In re Town of Union Mines, 39 W. Va. 179, 19 S. E. 398; Borchard v. Board of Sup'rs of Ventura County, 144 Cal. 10, 77 Pac. 708; Word v. Schow, 29 Tex. Civ. App. 120, 68 S. W. 192. But see Harris v. Millege, 151 Ind. 70, 51 N. E. 102.

<sup>57</sup> State ex rel. Brown v. Town of Westport, 116 Mo. 582, 22 S. W. 888; Vernon v. Board of Supervisors of San Bernardino County, 142 Cal. 513, 76 Pac. 253; Borchard v. Board of Supervisors of Ventura County, 144 Cal. 10, 77 Pac. 708; State v. Council, 106 Iowa, 731, 77 N. W. 474; Thompson v. State, 23 Tex. Civ. App. 370, 56 S. W. 603.

<sup>58</sup> People ex rel. Beasley v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937; People ex rel. Boardman v. Town of Linden, 107 Cal. 94, 40 Pac. 115; State v. Peterson (Tex. Civ. App.) 29 S. W. 415.

of election by the officer designated for that purpose.<sup>59</sup> The requirements of the statute having been complied with, the organization of the municipality becomes complete when the officers thereof are elected.<sup>60</sup>

### *Self-Chartered Cities*

In a number of states, constitutional provisions confer on municipalities of certain designated grades the power of framing their own charters. Such provisions are found in the Constitutions of California,<sup>61</sup> Colorado,<sup>62</sup> Minnesota,<sup>63</sup> Missouri,<sup>64</sup> Oklahoma,<sup>65</sup> Oregon,<sup>66</sup> and Washington.<sup>67</sup> While these provisions differ somewhat in detail, the general plan is well illustrated by the provisions of the Minnesota Constitution and statutes. In that state the judges of the district court of the district in which the village or city is situated, on their own motion, or on petition signed by 10 per cent. of the qualified voters as shown by the returns of the last election, may appoint a board of fifteen freeholders, who shall hold office for four years, to frame a charter for the new corporation. Within six months the board shall deliver to the chief executive of the village or city a draft of the proposed charter, signed by a majority of the members of the board. This proposed charter is submitted to the people for ratification at any general or special election, and four-sevenths of the legal votes cast at such election are necessary to ratify. If the vote is in favor of the ratification, the charter takes effect thirty days after the election.<sup>68</sup>

<sup>59</sup> See the statutes of the various states. And see *Dowie v. Chicago, W. & N. S. R. Co.*, 214 Ill. 49, 73 N. E. 354.

<sup>60</sup> *Coles County v. Allison*, 23 Ill. 437; *State ex rel. Jackson Tp. v. Arnold*, 38 Ind. 41.

<sup>61</sup> Const. art. 10, §§ 6-8½ (cities of more than 3,500 population).

<sup>62</sup> Const. 1902, art. 20.

<sup>63</sup> Const. art. 4, § 36 as amended 1898 (all villages and cities).

<sup>64</sup> Const. 1875, art. 9, §§ 16, 17 (cities of more than 100,000 population).

<sup>65</sup> Const. art. 18, § 3a.

<sup>66</sup> Const. art. 11, § 2.

<sup>67</sup> Const. art. 11, § 10 (cities of 20,000 population or more).

<sup>68</sup> Const. art. 4, § 36; Rev. Laws 1905, §§ 746-755.

The charter thus framed must, of course, be in harmony with the Constitution and laws of the state; but this does not prevent the adoption of charter provisions on any subject appropriate to the orderly conduct of municipal affairs, though they may differ in detail from existing general law. The limitation simply forbids the adoption of provisions contrary to the public policy of the state as declared by the general law.<sup>69</sup>

#### *Effect of General Law on Special Charters*

General laws for the incorporation of municipalities are, of course, usually prospective in their operation, and do not apply to corporations already organized under special charters.<sup>70</sup> Municipalities organized under special charters may usually, however, elect to surrender their special charters and reincorporate under the general law.

### TERRITORY AND POPULATION

13. To entitle a community to be incorporated as a town or village under the general law, it is generally required that the territory to be included therein shall consist of a platted portion, with a definite nucleus of population, and lands adjacent thereto.

In most states the law also requires as a condition precedent to incorporation that the territory thus included shall contain a specified number of inhabitants.

In view of the principles already stated regarding the general power of the Legislature to create municipal corporations, it is obvious that, except in so far as it may be controlled by

<sup>69</sup> STATE ex rel. GETCHELL v. O'CONNOR, 81 Minn. 79, 83 N. W. 498, Cooley, Cas. Mun. Corp. 16; Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940.

<sup>70</sup> Town of Decorah v. Bullis, 25 Iowa, 12; Butler v. Walker, 98 Ala. 358, 13 South. 261, 39 Am. St. Rep. 61; Flynn v. Little Falls Electric & Water Co., 74 Minn. 180, 78 N. W. 106; State v. Donovan, 89 Me. 448, 36 Atl. 982. But see Bowyer v. Camden, 50 N. J. Law, 87, 11 Atl. 137; Bullis v. City of Chicago, 235 Ill. 472, 85 N. E. 614.

constitutional provisions, the Legislature has absolute power to determine what bodies may be incorporated.<sup>71</sup> Consequently, unless prohibited by the Constitution, the Legislature may by special act incorporate any inhabited district within the state, be it large or small.<sup>72</sup> But where incorporation by special act is forbidden, and provision is made for incorporation under general law, the statute usually declares what area of territory and what population shall be necessary to entitle a community to incorporation as a municipality.

Generally the laws provide for the incorporation of districts consisting of platted lands and lands adjacent or contiguous thereto. Such laws contemplate a district center or nucleus of population on the platted lands, and that the lands adjacent thereto shall be lands that are essentially urban or suburban in character.<sup>73</sup> The corporation cannot as a rule include large rural districts, not urban or suburban in character, and having no community of interest with the platted portion of the territory.<sup>74</sup>

<sup>71</sup> *Mattox v. State*, 115 Ga. 212, 41 S. E. 709; *People v. Draper*, 15 N. Y. 532; *State ex rel. Town of Holland v. Lammers*, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. See, also, ante, § 11.

<sup>72</sup> See cases cited in the previous note.

<sup>73</sup> *State ex rel. v. Minnetonka Village*, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755; *State ex rel. Childs v. Village of Fridley Park*, 61 Minn. 146, 63 N. W. 613; *State ex rel. Hammond v. Dimond*, 44 Neb. 154, 62 N. W. 498; *State ex rel. Pond v. Clark*, 75 Neb. 620, 106 N. W. 971; *Judd v. State*, 25 Tex. Civ. App. 418, 62 S. W. 543; *State ex rel. Loy v. Mote*, 48 Neb. 683, 67 N. W. 810.

<sup>74</sup> *Commonwealth Real Estate Co. v. City of South Omaha*, 78 Neb. 368, 110 N. W. 1007; *State ex rel. Douglas v. Holloway*, 90 Minn. 271, 96 N. W. 40; *STATE ex rel. YOUNG v. VILLAGE of GILBERT*, 107 Minn. 364, 120 N. W. 528, *Cooley, Cas. Mun. Corp.* 20; *State ex rel. Young v. Village of Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260; *State ex rel. White v. Small*, 131 Mo. App. 470, 109 S. W. 1079; *In re Borough of Little Meadows*, 35 Pa. 335; *In re Narbeth Borough*, 16 Pa. Co. Ct. R. 32. But the fact that some of the lands included are rural in character will not invalidate the whole proceedings. *Stout v. St. Louis, I. M. & S. R. Co.*, 142 Mo. App. 1, 125 S. W. 230; *McClay v. City of Lincoln*, 32 Neb. 412, 49 N. W. 282; *McClesky v. State ex rel. Cottrell*, 4 Tex. Civ. App. 322, 23 S. W. 518. Whether the territory proposed

It is true that the mere fact that some of the territory included consists of farming or agricultural lands is not of itself sufficient to invalidate the incorporation.<sup>75</sup> In determining whether territory adjacent to the platted tract may properly be incorporated with it, the final test is whether such territory is contiguous,<sup>76</sup> and whether it has such a natural connection with the platted tract and the people residing therein have such community of interest that the whole may be subjected to municipal government.<sup>77</sup> The only purpose is to avoid uniting in one corporation district centers of population widely separated by tracts of agricultural or wild land.<sup>78</sup>

to be incorporated consists of lands proper to be included therein may be decided by the court or board to which the petition is submitted. *In re Village of Biron*, 146 Wis. 444, 131 N. W. 829; *People ex rel. Russell v. Town of Loyalton*, 147 Cal. 774, 82 Pac. 620. But see *STATE v. SIMONS*, 32 Minn. 540, 21 N. W. 750, Cooley, Cas. Mun. Corp. 12.

<sup>75</sup> *Harris v. Martindale*, 42 Ind. App. 633, 86 N. E. 494; *Ferguson v. City of Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795; *Levitt v. City of Wilson*, 72 Kan. 160, 83 Pac. 397; *State ex rel. White v. Small*, 131 Mo. App. 470, 109 S. W. 1079; *Indiana Imp. Co. v. Wagner*, 138 Ind. 658, 38 N. E. 49; *State ex rel. Patterson v. McReynolds*, 61 Mo. 203; *State v. Town of Baird*, 79 Tex. 63, 15 S. W. 98; *State ex rel. Scott v. Lichte*, 226 Mo. 273, 126 S. W. 466; *In re Borough of Blooming Valley*, 56 Pa. 66.

<sup>76</sup> *Harris v. Martindale*, 42 Ind. App. 633, 86 N. E. 494; *State ex rel. Scott v. Lichte*, 226 Mo. 273, 126 S. W. 466; *Town of Enterprise v. State*, 29 Fla. 128, 10 South. 740.

<sup>77</sup> *State ex rel. Simpson v. Village of Alice*, 112 Minn. 330, 127 N. W. 1118.

<sup>78</sup> *Town of Enterprise v. State*, 29 Fla. 128, 10 South. 740; *State ex rel. v. Minnetonka Village*, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755; *STATE ex rel. YOUNG v. VILLAGE of GILBERT*, 107 Minn. 364, 120 N. W. 528, Cooley, Cas. Mun. Corp. 20; *People ex rel. v. Lease*, 248 Ill. 187, 93 N. E. 783.

There cannot, of course, be two municipalities in the same territory. *State v. Town of Winter Park*, 25 Fla. 371, 5 South. 818; *Town of Enterprise v. State*, 29 Fla. 128, 10 South. 740. But this rule does not prevent the state from organizing and maintaining county and municipal governments over the same territory, *Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; and including municipal territory in a township, drainage district, or other quasi corporate boundary, *People ex rel. v. Nibbe*, 150 Ill. 269, 37 N. E. 217.

The general law may, and often does, provide that the territory sought to be incorporated must contain not less than a specified number of inhabitants. Such provisions must, of course, be complied with in order that a valid corporation may be created.<sup>79</sup>

### ASSENT TO INCORPORATION

14. Except in those states where the Constitution and statutes require popular assent to the creation of a municipality, it is not necessary that a special charter shall be assented to by the people.

Where incorporation is under general law, popular assent to incorporation is usually required as a condition precedent thereto.

It is a well-established doctrine with regard to private corporations that the charters thereof are contracts between the state and the corporation or corporators, and therefore not subject to alteration or revocation at the will of either party.<sup>80</sup> They have been adopted by the mutual agreement of both parties, and the agreement of both is essential to their amendment or repeal.<sup>81</sup> But with municipal corporations the rule is different.<sup>82</sup> Since the municipality is created at the legislative discretion, and for the public welfare, as an instrumentality

<sup>79</sup> *In re Incorporation of Haines Mission*, 3 Alaska, 588; *Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126; *State v. Bilby*, 60 Kan. 130, 55 Pac. 848; *In re Village of Elba*, 30 Hun (N. Y.) 548; *State ex rel. Town of Holland v. Lammers*, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

<sup>80</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.

<sup>81</sup> *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 17 L. Ed. 604.

<sup>82</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511, 13 L. Ed. 518; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *Smith v. Westcott*, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Smith, Mun. Corp.* §§ 60, 78.

of government, it is not essential that the inhabitants or residents of the municipal boundaries shall give consent to the charter, as is required in the case of private corporations.<sup>83</sup> In the case of special charters, their constitutional enactment by the Legislature creates the corporation;<sup>84</sup> and, in states where the Constitution does not forbid, such corporations may be created whenever and wherever the Legislature shall deem best, regardless of the local popular wish.<sup>85</sup>

It is true that a refusal of the people to recognize the incorporation or to organize thereunder might, if unanimously persisted in, result in making the statute a dead letter; but the act of even a small minority in organizing the corporation and setting the municipal machinery in motion would revive the statute, inspire the dormant charter, and erect the municipality into a valid, existing corporation.<sup>86</sup> It would then become, as was intended, an active agent and instrumentality of the government, with the right to compel respect and obedience from the dissenting majority of members, however preponderant they might be in numbers or influence.<sup>87</sup>

<sup>83</sup> People ex rel. v. City of Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346; People v. Morris, 13 Wend. (N. Y.) 325; Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; Berlin v. Gorham, 34 N. H. 266, Cooley, Cas. Mun. Corp. 15; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488; State v. Curran, 12 Ark. 321; Warren v. Mayor and Aldermen of Charlestown, 2<sup>1</sup> Gray (Mass.) 84; Coles v. Madison County, 1 Ill. (Breese) 154, 12 Am. Dec. 161; Morford v. Unger, 8 Iowa, 82; Taylor v. Commissioners of Town of Newberne, 55 N. C. 141, 64 Am. Dec. 566; State ex rel. Fremont, E. & M. V. R. Co. v. Babcock, 25 Neb. 709, 41 N. W. 654.

<sup>84</sup> SMITH v. CRUTCHER, 92 Ky. 586, 18 S. W. 521, Cooley, Cas. Mun. Corp. 24.

<sup>85</sup> See cases cited in preceding notes. And see ante, § 11.

<sup>86</sup> President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; Muscatine Turn Verein v. Funck, 18 Iowa, 469; Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; People ex rel. v. City of Butte, 4 Mont. 174, 1 Pac. 414, 47 Am. Rep. 346.

See, contra, Lea v. Hernandez, 10 Tex. 137.

<sup>87</sup> State v. Canterbury, 28 N. H. 195; Warren v. Mayor and Alder-

*Grant Conditional upon Acceptance*

Yet it is competent for the Legislature to make the grant of charter powers conditional upon their acceptance by a majority of the inhabitants. A clause requiring that, before the charter shall go into operation, the people of the proposed municipality shall, by public election or otherwise, give assent to its provisions by formal acceptance of the same, is not ground for impeaching the act as an unwarranted delegation of legislative power.<sup>88</sup> Such a clause has been repeatedly declared by our courts to be a valid legislative condition precedent to the organization of a municipal corporation, with the result that the charter is impotent and the municipality non-existent until the people shall call it into being.<sup>89</sup> Moreover, under constitutional authorization to delegate legislative power for such purpose, special charters may be granted to municipal corporations by courts, commissioners, or boards thereunto authorized by act of the General Assembly.<sup>90</sup>

*Delegated Powers*

A charter thus obtained from a sublegislature in all material particulars resembles the special charter of legislative enactment in form and effect. The court or board may be thus

men of Charlestown, 2 Gray (Mass.) 84; *People v. President, etc., of Manhattan Co.*, 9 Wend. (N. Y.) 351.

<sup>88</sup> *Bull v. Read*, 18 Grat. (Va.) 78; *State v. Noyes*, 30 N. H. 279; *People ex rel. Wilson v. Salomon*, 51 Ill. 37; *Mayor, etc., of City of Brunswick v. Finney*, 54 Ga. 317; *People ex rel. Graves v. McFadden*, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66. When the charter of a municipal corporation provides for submission to the people for acceptance, such acceptance is *prima facie* shown by a subsequent act of the Legislature recognizing the charter as in force. *State v. Tosney*, 26 Minn. 262, 3 N. W. 345.

<sup>89</sup> *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Foote v. City of Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737; *Smith v. McCarthy*, 56 Pa. 359; *State ex rel. Dome v. Wilcox*, 45 Mo. 458; *People ex rel. Caldwell v. Reynolds*, 10 Ill. (5 Gilman) 1; *People v. Gunn*, 85 Cal. 238, 24 Pac. 718.

<sup>90</sup> *Ford v. Town of North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *State v. Leatherman*, 38 Ark. 81; *STATE v. SIMONS*, 32 Minn. 540, 21 N. W. 750, *Cooley, Cas. Mun. Corp.* 12.

vested with plenary legislative discretion to specify and enumerate the powers to be conferred by the charter, and fix the boundaries of the municipality. The charter in such case will usually take the form of a judicial decree or board ordinance, and will be in all particulars subject to the general rules and doctrines of the law as applied to special legislative charters.<sup>91</sup>

#### *Acceptance Implied*

Unless the acceptance of the special charter is required to be manifested in some particular way, such acceptance may be implied, as from acts done under it.<sup>92</sup>

#### *Particular Cases of Approval and Acceptance*

Certain provisions contained in the charter, such as the power to incur bonded indebtedness, may be made dependent on the consent of the people.<sup>93</sup> So, too, it is competent for the Legislature to make the continuance of the municipal organization dependent on the continued public approval of the citizens, and to authorize them by public election to terminate the corporation at will.<sup>94</sup>

#### *General Law—Incorporation upon Popular Initiative*

Where the incorporation is under general law, the popular assent is usually, if not invariably, required, as an essential feature of the incorporation, and a condition precedent thereto. In such cases the incorporation is effected upon popular initiative, and so, practically rather than formally, there is an approval of the charter of the municipality. It is to be remembered, however, that even in those states where general laws for creating municipal corporations exist the Legislature

<sup>91</sup> Ashley v. Town of Calliope, 71 Iowa, 466, 32 N. W. 458; State v. Goowin, 69 Tex. 55, 5 S. W. 678.

<sup>92</sup> City of Lafayette v. Jenners, 10 Ind. 70; Taylor v. Commissioners of Town of Newberne, 55 N. C. 141, 64 Am. Dec. 566; Blessing v. City of Galveston, 42 Tex. 641.

<sup>93</sup> State v. City of Waxahachie, 81 Tex. 628, 17 S. W. 348; Bank of Rome v. Village of Rome, 18 N. Y. 38; People ex rel. Blanding v. Burr, 13 Cal. 343; Weaver v. Cherry, 8 Ohio St. 564.

<sup>94</sup> Blauvelt v. Village of Nyack, 9 Hun. (N. Y.) 153; State ex rel. Alsop v. Husband, 26 Ind. 308.

possesses inherent power, unless forbidden by the Constitution to incorporate by special act, and to this no popular assent is required.<sup>95</sup>

### CORPORATIONS BY IMPLICATION OR PRESCRIPTION

**15. BY IMPLICATION.**—A corporation may be created by implication as well as by positive expression of the statute, provided there is a clear manifestation of legislative intention to constitute a corporation, or to invest it with corporate powers and franchises, or to recognize an existing body as having the essential franchises and powers of a corporation.

**BY PRESCRIPTION.**—The existence of a municipal corporation will be presumed, where it is shown that the community has claimed and exercised corporate functions, with the knowledge and acquiescence of the Legislature, and without interruption or objection, for a period long enough to afford title by prescription.

In the English royal charters, the words usually employed to constitute a corporation were, "Creamus, erigimus, fundamus, incorporamus"<sup>96</sup> ("We create, erect, found, incorporate"), though words of similar import and effect were held sufficient at common law.<sup>97</sup> For instance, a royal charter to the men of Dale to annually elect a mayor and commonalty, was held sufficient to incorporate them.<sup>98</sup> So a grant to the inhabitants of a town to be "a free borough," without any special words of creation or incorporation, is sufficient.<sup>99</sup> The omission of

<sup>95</sup> See ante, § 11.

<sup>96</sup> 1 Bl. Comm. 474.

<sup>97</sup> 1 Bl. Comm. 474. See, also, Stebbins v. Jennings, 10 Pick. (Mass.) 172; Dean v. Davis, 51 Cal. 406; Society for Propagation of Gospel v. Pawlet, 4 Pet. (U. S.) 480, 7 L. Ed. 927.

<sup>98</sup> 21 Edw. IV, 56; Dill. Mun. Corp. (4th Ed.) § 42.

<sup>99</sup> Dill. Mun. Corp. (4th Ed.) § 42.

the words "to plead and be impleaded," or to "have a seal," or to specifically mention the power to make by-laws, would not be fatal.<sup>1</sup> The omission of the name would not be a fatal defect, provided that name could be ascertained or inferred from the terms of the act.<sup>2</sup> Certain powers and privileges are essential to the existence of a body corporate, such as perpetual succession, right to contract, hold property, and to sue and be sued, etc.; and if the act either expresses these things, or permits them to be fairly implied, the courts will usually sustain the corporation.

The rules of the common law in regard to corporations are of general application in this country, and wherever powers and privileges existing only under incorporation are conferred upon a body of persons, or upon the residents or inhabitants of a certain town or district, a corporation will be implied, to the end that the grant may not fail. It has often been declared to be a question of legislative intent, to be shown either by expression or by implication.<sup>3</sup>

A leading case in Massachusetts will illustrate the judicial inclination to maintain and support wholesome entities, rather than cause a failure of legislative intention. The inhabitants of the several school districts were empowered by statute at a regular meeting to raise money to erect, repair, or purchase a schoolhouse, and do other things necessary to provide a place for the public school—the majority having power to control. After much discussion and many adjournments, the Supreme Court finally settled upon the opinion that, though not expressly incorporated, the inhabitants thereof possessed sufficient corporate powers to maintain an action under a contract

<sup>1</sup> Dill. Mun. Corp. § 42; Conservators v. Ash, 10 Barn. & C. 349.

<sup>2</sup> Dill. Mun. Corp. (4th Ed.) § 42; Trustees of Ministerial & School Fund in Levant v. Parks, 10 Me. 441; School Com'rs v. Dean, 2 Stew. & P. (Ala.) 190.

<sup>3</sup> Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Inhabitants of Fourth School Dist. in Rumford v. Wood, 13 Mass. 193; Mahoney v. Bank of State, 4 Ark. 620; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 84

to build a schoolhouse and to make to them a lease of land.<sup>4</sup> This case carries the doctrine of implied corporation to its farthest limit; but it will be observed that the corporation here implied and recognized was not a municipal, but merely a quasi, corporation, and of the very lowest order of corporate life.

That incorporation may be implied from official recognition of a municipality is declared in many cases.<sup>5</sup> Thus it has been held that incorporation must be implied where the Legislature has recognized a place or a municipality by annexing other municipal territory to it,<sup>6</sup> by conferring additional powers upon it,<sup>7</sup> by granting to it land for a town commons,<sup>8</sup> by empowering it to issue municipal bonds,<sup>9</sup> or by enacting laws relating to elections in the municipality.<sup>10</sup>

#### *Existence by Prescription*

In England, notwithstanding the doctrine that a corporation must have the authority of royal assent or act of Parliament, municipalities existed without either of these charters.<sup>11</sup> They had existed from time immemorial, and usually their origin is to be found in tradition or romance. Their usages and customs were the only evidence of their franchises, privileges, and powers.

These municipalities were divided into two classes—the one known as “common-law corporations,” and the other as “cor-

<sup>4</sup> *Inhabitants of Fourth School Dist. in Rumford v. Wood*, 13 Mass. 193.

<sup>5</sup> *State v. Leatherman*, 38 Ark. 81; *People ex rel. Gridley v. Farnham*, 35 Ill. 562; *State v. Tosney*, 26 Minn. 262, 3 N. W. 345; *Mattox v. State*, 115 Ga. 212, 41 S. E. 709; *State v. Young*, 3 Kan. 445.

<sup>6</sup> *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489.

<sup>7</sup> *Broking v. Van Valen*, 56 N. J. Law, 85, 27 Atl. 1070.

<sup>8</sup> *Commissioners of Town of Bath v. Boyd*, 23 N. C. 194.

<sup>9</sup> *Jameson v. People ex rel. Nettleton*, 16 Ill. 257, 63 Am. Dec. 304.

<sup>10</sup> *State ex rel. Young v. Village of Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260.

<sup>11</sup> This is notably true of the great corporation of London, the existence of which antedates the Norman Conquest; but its corporate character has been recognized repeatedly in royal charters or grants of powers and in acts of Parliament.

porations by prescription"; the former existing by immemorial usage,<sup>12</sup> and the latter upon a royal charter presumed to have been granted and to have been lost or destroyed.<sup>13</sup>

In the New England states it has been frequently ruled that, where no charter or act of incorporation for a town can be found, the corporation may be proved by reputation showing that the town has claimed and exercised corporate functions with the knowledge and acquiescence of the Legislature, and without interruption or objection, for a period long enough to afford a title by prescription.<sup>14</sup> So in New York with regard to a school district.<sup>15</sup> Likewise in the newer states of Indiana,<sup>16</sup> Illinois, Wisconsin,<sup>17</sup> and Minnesota<sup>18</sup> the courts have applied the same doctrine to municipal corporations; Illinois judges declaring municipal corporations to be favorites of the law, as created for the public good, and demanded by the wants of society.<sup>19</sup>

It has been regarded as sufficient to show incorporation

<sup>12</sup> *Rex v. Mayor, etc., of Stratford on Avon*, 14 East, 348; *Mayor of Hull v. Horner*, Cwp. 104.

<sup>13</sup> *Cooley*, Const. Lim. (6th Ed.) p. 236; *Jameson v. People ex rel. Nettleton*, 16 Ill. 257, 63 Am. Dec. 304; *Back v. Carpenter*, 29 Kan. 349.

<sup>14</sup> *Inhabitants of Stockbridge v. Inhabitants of West Stockbridge*, 12 Mass. 400; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *Town of New Boston v. Town of Dunbarton*, 12 N. H. 409; *Trott v. Warren*, 11 Me. 227; *Half-way River School Dist. v. Bradley*, 54 Conn. 74, 5 Atl. 861. In *Dillingham v. Snow*, 5 Mass. 547, reputation was allowed to prevail because a large portion of the records had been destroyed by fire. See, also, *Town of Londonderry v. Town of Andover*, 28 Vt. 416; *Broking v. Van Valen*, 56 N. J. Law, 85, 27 Atl. 1070; *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 Pac. 774.

<sup>15</sup> *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319.

<sup>16</sup> *Pidgeon v. McCarthy*, 82 Ind. 321, in which case a lot had been taxed by the city government of Vincennes for sixty years without question or objection, and this was held sufficient to show that the lot was within the corporation limits.

<sup>17</sup> *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252.

<sup>18</sup> *State ex rel. Young v. Village of Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260.

<sup>19</sup> *Jameson v. People ex rel. Nettleton*, 16 Ill. 257, 63 Am. Dec. 304.

that the community has exercised the powers of a municipality for fifty years,<sup>20</sup> thirty years,<sup>21</sup> and even for twenty years.<sup>22</sup> In all such cases the question to be decided is not one of law, but one of fact, viz.: Has this body claiming to be a corporation maintained an unbroken existence, and claimed to exercise corporate powers so long as to afford presumption of an original grant of corporate powers and franchises? Where this is found, it seems to be the rule of law to assume that the corporation has all the rights, powers, privileges, and franchises conferred by general law upon similar bodies.<sup>23</sup>

These cases are perhaps sufficient in number to warrant us in saying that there may be in America a municipal corporation other than that created by legislative enactment; but the cases are so few in number where any resort to this old English doctrine is necessary, and the question so unlikely to recur as to warrant passing from them without further notice.

#### **VALIDITY OF INCORPORATION—COMPLIANCE WITH CONDITIONS**

##### **16. Substantial compliance with the requirements of the general laws for creating municipal corporations is essential and sufficient.**

The creation of a legal body invested with functions of government is too important to be passed over lightly. Whatever things, therefore, the Legislature has prescribed as prerequisites for the erection of a municipality, which pertains

<sup>20</sup> *Town of New Boston v. Town of Dunbarton*, 12 N. H. 409.

<sup>21</sup> *Inhabitants of Stockbridge v. Inhabitants of West Stockbridge*, 12 Mass. 400.

<sup>22</sup> *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *State ex rel. Young v. Village of Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260.

<sup>23</sup> *Town of New Boston v. Town of Dunbarton*, 15 N. H. 201; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *State v. Bunker*, 59 Me. 366; *State v. Leatherman*, 38 Ark. 81; *Cooley, Const. Lim.* (6th Ed.) 238.

to its essential features and powers, must receive from the people about to enter into it such measure of compliance as evinces deliberate consideration by them before entering upon this important undertaking of local self-government. That is to say, there must be a substantial compliance with the requirements of the laws relating to the creation and organization of municipal corporations.<sup>24</sup>

On the other hand, the interest of the citizens and of the public in an arm of the government is too great to allow little things to imperil its existence. Here applies the maxim, "De minimis non curat lex." The erection of a municipality is not academic, but political and so the courts apply, in cases challenging the existence of the corporations, those larger rules of life and action which pertain to public affairs, and give substantial justice. Failure to comply with provisions of the statute which are merely directory will not render the incorporation invalid,<sup>25</sup> and a substantial compliance with the law is generally held sufficient.<sup>26</sup>

### SAME—DE FACTO CORPORATIONS

17. Where a municipality is defective in some essential feature of its organization, it may, nevertheless, be recognized as an existing corporation de facto.

To constitute a municipal corporation de facto there must be:

- (a) A valid law authorizing incorporation;
- (b) An attempt in good faith to organize under it;
- (c) A colorable compliance with the law;
- (d) An assumption of corporate powers.

From the considerations of public policy to which attention has been called in the preceding section there has arisen and

<sup>24</sup> Town of Enterprise v. State, 29 Fla. 128, 10 South. 740.

<sup>25</sup> Coles County v. Allison, 23 Ill. 437. See, also, People ex rel. Skelton v. City of Los Angeles, 133 Cal. 338, 65 Pac. 749.

<sup>26</sup> Woods ex rel. Rodgers v. Henry, 55 Mo. 560; City of Omaha v.

been recognized a class of municipal corporations known as corporations *de facto*. In a certain sense these might be called quasi corporations, but legally they are wholly unlike that class of corporations. They are complete existing corporations, which are defective in some essential feature of their organization,<sup>27</sup> but whose right to continued existence may be impeached only by the state in a direct proceeding for that purpose.<sup>28</sup>

The judicial views of this class of corporations are as variant as the social and political conditions of the states where they are entertained. In most states it is apparently settled that, to constitute a corporation *de facto*, there must be (1) a valid law authorizing a corporation; (2) an attempt in good faith to organize under it; (3) a colorable compliance with this law; (4) an assumption of corporate powers.<sup>29</sup> It is, of course, fundamental that, if there is no law authorizing the creation of a municipality, any attempt to organize is void, and the resulting organization is not even a *de facto* corpora-

City of South Omaha, 31 Neb. 378, 47 N. W. 1113; Borough of Glen Ridge v. Stout, 58 N. J. Law, 598, 33 Atl. 858; SHAPLEIGH v. CITY OF SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319; State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941.

<sup>27</sup> Town of Constitution v. Chestnut Hill Cemetery Ass'n, 136 Ga. 778, 71 S. E. 1037; Laird v. City of De Soto (C. C.) 22 Fed. 421; Village of Arapahoe v. Albee, 24 Neb. 242, 38 N. W. 737, 8 Am. St. Rep. 202; City of Omaha v. City of South Omaha, 31 Neb. 378, 47 N. W. 1113; Borough of Glen Ridge v. Stout, 58 N. J. Law, 598, 33 Atl. 858; White v. City of Quanah (Tex. Civ. App.) 27 S. W. 839; SHAPLEIGH v. CITY OF SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319; Attorney General v. Town of Dover, 62 N. J. Law, 138, 41 Atl. 98. Any actual organization of a municipality in ostensible possession and actual exercise of municipal powers is a *de facto* corporation. City of Salem to Use of Roney v. Young, 142 Mo. App. 160, 125 S. W. 857.

<sup>28</sup> See post, § 18.

<sup>29</sup> Ward v. Gradin, 15 N. D. 649, 109 N. W. 57; Kansas Town & Land Co. v. City of Kensington, 6 Kan. App. 247, 51 Pac. 804; Gilkey v. Town of How, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483; Board of Education of Flatwoods Dist. v. Berry, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. Rep. 975.

tion;<sup>30</sup> and it has been held in a few instances that there cannot be even a de facto organization under a void act.<sup>31</sup>

On the other hand, other courts,<sup>32</sup> more lenient towards this class of corporations, have declared that any statute, even though unconstitutional, is sufficient to authorize the creation of such a corporation; and if there has been an effort in good faith, and in reasonable compliance with its requirements, to organize under it, there is a de facto corporation. In the midst of these widely divergent decisions, it is hazardous to attempt to state definitely the essentials of a corporation de facto which will be applicable in all the states.

A well-known writer on the law of corporations has given a clear view of the state of American law on this subject: "Our decisions oscillate between two extreme views: (1) That, where a body of men act as a corporation in the ostensible possession of corporate powers, it will be conclusively presumed in all cases, except in a direct proceeding against them by the state to vacate their franchise, that they are incorporated. (2) That the conditions named in statutes authorizing the organization of corporations are conditions precedent that must be strictly complied with, or the corporation does not exist, and that the want of compliance with any one condition precedent may be shown by any one in a private litigation with a pretended corporation, unless he has estopped himself by his conduct from challenging its corporate existence, and frequently without reference to the question of estoppel."<sup>33</sup> The sound doctrine of the law, as usual in such cases, is not to be found at either one of these extremes, and

<sup>30</sup> City of Guthrie v. Wylie, 6 Okl. 61, 55 Pac. 103.

<sup>31</sup> Colton v. Rossi, 9 Cal. 595; Oswego Tp. v. Anderson, 44 Kan. 214, 24 Pac. 486.

<sup>32</sup> Lang v. City of Bayonne, 74 N. J. Law, 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961; Attorney General v. Town of Dover, 62 N. J. Law, 138, 41 Atl. 98; Speer v. Board of Com'rs, 88 Fed. 749, 32 C. C. A. 101.

<sup>33</sup> 1 Thomp. Corp. § 495.

ultimately a general consensus of judicial opinion will doubtless establish the law on safe middle ground, consistent with the rule of compliance stated in the preceding paragraph.

### SAME—HOW TESTED

18. The validity of a municipal corporation is not subject to private or collateral attack, but is subject to impeachment only by the state in a direct proceeding for that purpose.

This rule naturally results from the source and nature of municipal power. The state has created the municipality as an agency of government. It may terminate that existence at will.<sup>84</sup> If the inhabitants of a certain boundary within the state limits are exercising municipal functions, that fact is, of course, known to the state; and whether that municipality has been erected upon a valid foundation is a matter of public interest, of which the state is the embodied representative. In the case, therefore, of an implied corporation, or a corporation *de facto*, the municipal character of its existence and right to exist is a subject to be considered and determined by the state for the public, and that, too, by a direct proceeding having that object in view.<sup>85</sup>

<sup>84</sup> *Girard v. Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *Hawkins v. Intendant, etc., of Town of Jonesboro*, 63 Ga. 527; *State ex rel. Hernandez v. Flanders*, 24 La. Ann. 57; *Layton v. City of New Orleans*, 12 La. Ann. 515; *People ex rel. Attorney General v. Hill*, 7 Cal. 97; *Sedgwick County Com'rs v. Bailey*, 11 Kan. 631; *Vance v. City of Little Rock*, 30 Ark. 435; *City of San Francisco v. Canavan*, 42 Cal. 541; *United States ex rel. Brown v. Memphis*, 97 U. S. 284, 24 L. Ed. 937.

<sup>85</sup> *Tied. Mun. Corp. § 385; SHAPLEIGH v. CITY OF SAN ANGELO*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319; *Graham v. City of Greenville*, 67 Tex. 62, 2 S. W. 742; *Chicago, St. L. & N. O. R. Co. v. Town of Kentwood*, 49 La. Ann. 931, 22 South. 192; *Attorney General v. Town of Belleville*, 81 N. J. Law, 200, 80 Atl. 116; *Ex parte Keeling*, 54 Tex. Cr. R. 118, 121 S. W. 605, 130 Am. St. Rep. 884; *Lang v. City of Bayonne*, 74 N. J. Law, 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12

The question as to the validity of the incorporation cannot be raised by a private person in a collateral proceeding,<sup>36</sup> as, for example, in a proceeding to test the validity of an ordinance,<sup>37</sup> or an action to recover on interest coupons on municipal bonds,<sup>38</sup> or in proceedings to compel the payment of a judgment,<sup>39</sup> or in proceedings relating to the levy and collection of taxes.<sup>40</sup>

Even the state has been held estopped from denying the

Ann. Cas. 961; *Board of Education of Flatwoods Dist. v. Berry*, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. Rep. 975; *City of Carthage v. Burton*, 51 Tex. Civ. App. 195, 111 S. W. 440.

Quo warranto is the proper proceeding to test the validity of the corporation.. *State ex inf. Crow v. Fleming*, 147 Mo. 1, 44 S. W. 758; *OSBORNE v. VILLAGE OF OAKLAND*, 49 Neb. 340, 68 N. W. 506, Cooley, Cas. Mun. Corp. 347; *Attorney General v. Town of Belleville*, 81 N. J. Law, 200, 80 Atl. 116.

<sup>36</sup> *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558; *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *State v. Leatherman*, 38 Ark. 81; *Town of Henderson v. Davis*, 106 N. C. 88, 11 S. E. 573; *State v. Carr*, 5 N. H. 367; *Worley v. Harris*, 82 Ind. 493; *Society for Propagation of Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 7 L. Ed. 927; *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319; *Bird v. Perkins*, 33 Mich. 28; *People v. Maynard*, 15 Mich. 463; *Lanning v. Carpenter*, 20 N. Y. 447; *Rumsey v. People*, 19 N. Y. 41; *Jameson v. People ex rel. Nettleton*, 16 Ill. 257, 63 Am. Dec. 304; *Swain v. Comstock*, 18 Wis. 463; *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; *Levitt v. City of Wilson*, 72 Kan. 160, 83 Pac. 397; *People v. Smith*, 131 Mich. 70, 90 N. W. 666; *Agner v. Commonwealth*, 103 Va. 811, 48 S. E. 493; *Ward v. Gradin*, 15 N. D. 649, 109 N. W. 57; *Ex parte Koen*, 58 Tex. Cr. R. 279, 125 S. W. 401; *Board of Education of Flatwoods Dist. v. Berry*, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. Rep. 975; *State v. Several Parcels of Land*, 78 Neb. 703, 111 N. W. 601; *Id.*, 80 Neb. 11, 113 N. W. 810.

<sup>37</sup> *Town of Decorah v. Gillis*, 10 Iowa, 234; *Inhabitants of Town of Fredericktown v. Fox*, 84 Mo. 59; *Town of Constitution v. Chestnut Hill Cemetery Ass'n*, 136 Ga. 778, 71 S. E. 1037. Or in habeas corpus for release from arrest under an ordinance. *Ex parte Keeling*, 54 Tex. Cr. R. 118, 121 S. W. 605, 130 Am. St. Rep. 884.

<sup>38</sup> *ST. PAUL GASLIGHT CO. v. VILLAGE OF SANDSTONE*, 73 Minn. 225, 75 N. W. 1050, Cooley, Cas. Mun. Corp. 31.

<sup>39</sup> *Lee v. City of Thief River Falls*, 82 Minn. 88, 84 N. W. 654.

<sup>40</sup> *Bateman v. Florida Commercial Co.*, 26 Fla. 423, 8 South. 51; *Bird v. Perkins*, 33 Mich. 28; *McClay v. City of Lincoln*, 32 Neb. 412, 49 N. W. 282; *People ex rel. v. Bowman*, 247 Ill. 276, 93 N. E. 244.

validity of the incorporation where the municipality has existed and exercised corporate functions for a long time with the consent of the state;<sup>41</sup> and, whenever the question of the validity of incorporation is raised, there is a strong tendency by the courts, in recognition of the status quo, to uphold the validity and power of the municipality.<sup>42</sup> In other words, the courts, not only in the construction of statutes and contracts, but in the administration of affairs and determination of great public questions, recognize and respect the maxim, "Ut res magis valeat quam pereat."

## WHAT CONSTITUTES MUNICIPAL MEMBERSHIP

### 19. The persons residing within the corporate limits are members of the municipal corporation.

¶ This is wholly unlike the rule and practice in private corporations. ¶ Membership in a private corporation is always voluntary, and in a stock corporation is evidenced by the holding of a certificate of a share or shares of the capital stock.<sup>43</sup> In a municipal corporation it is otherwise. Every person re-

<sup>41</sup> State ex rel. Young v. Village of Harris, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260; People v. Board of Sup'r's of Gladwin County, 41 Mich. 647, 2 N. W. 904; City of St. Louis v. Shields, 62 Mo. 247. In State v. Leatherman, 38 Ark. 81, Eakin, J., said: "We are emboldened to declare in behalf of the public good, that the state herself may, by long acquiescence, and by the continued recognition through her officers, state and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law." See, also, People v. Maynard, 15 Mich. 463; McCulloch v. State, 11 Ind. 424; Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806; Jameson v. People ex rel. Nettleton, 16 Ill. 257, 63 Am. Dec. 304; State ex rel. Sanche v. Webb, 110 Ala. 214, 20 South. 462.

<sup>42</sup> People ex rel. Gridley v. Farnham, 35 Ill. 562; Jameson v. People ex rel. Nettleton, *supra*; SMITH v. CRUTCHER, 92 Ky. 586, 18 S. W. 521, Cooley, Cas. Mun. Corp. 24; State v. Young, 3 Kan. 445; Rains v. City of Oshkosh, 14 Wis. 372.

<sup>43</sup> State ex rel. White v. Ferris, 42 Conn. 560; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801.

siding within the municipal boundaries, whether he will or not, is a member of the corporation, subject to its lawful authority, and entitled to the privileges and immunities of membership, as well as liable to the burdens and liabilities thereof.<sup>44</sup> And persons who come within the corporate limits, though they are only passing through the city, are, so long as they remain within its boundaries, subject to all its police regulations, and bound to take notice of and obey the same.<sup>45</sup>

By the common law the members of the municipal corporation were those only to whom the king chose to issue his letters patent (and their successors), usually a portion of the citizens. Nonresidents, however, were often members. The integral parts of the corporation were the mayor, the aldermen, and the commonalty; and the presence of all these integral parts was essential to the validity of corporate action.

The spirit of modern democracy has overcome all these exclusive practices and aristocratic ideas, in England as well as in America, and the inhabitants of the corporations are now the source of power, and the officers are their servants.

## CLASSIFICATION OF MUNICIPALITIES

**20. For the purposes of legislation municipal corporations are usually divided into classes depending on population, so that the interests of bodies having similarity of situation, circumstances, and requirements may have those interests best subserved by similar legislation.**

<sup>44</sup> People ex rel. Van Bokkelen v. Canaday, 73 N. C. 198, 21 Am. Rep. 465; Oakes v. Hill, 10 Pick. (Mass.) 333.

<sup>45</sup> Heland v. City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670; Mayor, etc., of City of Knoxville v. King, 7 Lea (Tenn.) 441; Bott v. Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47; Strauss v. Town of Pontiac, 40 Ill. 301; Village of Buffalo v. Webster, 10 Wend. (N. Y.) 99; Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505, 24 Am. Rep. 756.

As it is impracticable to enact general laws which can be beneficially applied to all the municipalities of the state, municipal corporations are usually divided into classes for the purposes of legislation, to the end that municipalities which are similar in situation and circumstances may have their requirements and interests best subserved by similar regulations.<sup>46</sup> Such classification must be based on some rational difference of situation or condition,<sup>47</sup> and must have a reasonable relation to the purposes to be attained by legislation.<sup>48</sup> Usually the plan pursued is to classify according to population.<sup>49</sup> Thus in Minnesota municipalities containing not more than 3,000 inhabitants are classified as villages; while those containing more than 3,000 inhabitants are cities, and are divided into four classes, namely, first, containing 50,000 inhabitants or more; second, containing 20,000 and less than 50,000; third, containing 10,000 and less than 20,000; fourth, containing 3,000 and less than 10,000.<sup>50</sup>

In some states, a change in population changes the grade of the city ipso facto;<sup>51</sup> while in others some prescribed steps must be taken to change the grade of the city.<sup>52</sup>

<sup>46</sup> Commonwealth v. Gilligan, 195 Pa. 504, 46 Atl. 124; Fitzgerald v. New Brunswick, 47 N. J. Law, 479, 1 Atl. 496, 54 Am. Rep. 182.

<sup>47</sup> Northwestern University v. Village of Wilmette, 230 Ill. 80, 82 N. E. 615.

<sup>48</sup> L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234; State ex rel. Attorney General v. Miller, 100 Mo. 448, 13 S. W. 677.

<sup>49</sup> People ex rel. Daniels v. Henshaw, 76 Cal. 436, 18 Pac. 413; Northwestern University v. Village of Wilmette, 230 Ill. 80, 82 N. E. 615; Wood v. Atlantic City, 56 N. J. Law, 232, 28 Atl. 427. The courts will take judicial notice of the class to which a municipality belongs and of its population according to the last census. State ex rel. Martin v. Wofford, 121 Mo. 61, 25 S. W. 851; People v. Page, 6 Utah, 353, 23 Pac. 761.

<sup>50</sup> Rev. Laws Minn. 1905, §§ 700, 746.

<sup>51</sup> State ex rel. Einstein v. Northup, 79 Neb. 822, 113 N. W. 540.

<sup>52</sup> Brady v. State, 59 Ohio St. 546, 53 N. E. 63.

**OPERATION AND EFFECT OF INCORPORATION**

21. When the organization of a municipal corporation is completed, it at once succeeds to all such rights as are necessary to the proper control of the territory incorporated; but it does not necessarily succeed to the property and liabilities of a pre-existing corporation.

Pending the incorporation of a municipality, the political status quo remains unchanged, and the acts of existing local officers and boards affecting the territory of the proposed municipality are valid and binding.<sup>53</sup> But as soon as the organization is completed the new municipality is endowed with all the powers, privileges, and franchises conferred by the statute or charter, and succeeds to all such political and governmental powers as are necessary to the proper control of the territory incorporated.<sup>54</sup> The new corporation acquires exclusive jurisdiction over all highways existing within the district incorporated;<sup>55</sup> but its rights and responsibilities are dependent on the conditions existing in fact and in law at the date of incorporation.<sup>56</sup>

The new municipality does not, however, necessarily succeed to the property<sup>57</sup> and liabilities<sup>58</sup> of the pre-existing corpora-

<sup>53</sup> State ex rel. Garrison v. Commissioners of Putnam County, 23 Fla. 632, 3 South. 164.

<sup>54</sup> People v. Morris, 13 Wend. (N. Y.) 325; Almand v. Atlanta Consol. St. Ry. Co., 108 Ga. 417, 34 S. E. 6.

<sup>55</sup> McCain v. State, 62 Ala. 138; Almand v. Atlanta Consol. St. Ry. Co., 108 Ga. 417, 34 S. E. 6; Brown v. Hines, 16 Ind. App. 1, 44 N. E. 655; Raymond v. City of Wichita, 70 Kan. 532, 79 Pac. 323; Gilpin v. City of Ansonia, 68 Conn. 72, 35 Atl. 777.

<sup>56</sup> City of Maysville v. Stanton (Ky.) 14 S. W. 675; Gilpin v. City of Ansonia, 68 Conn. 72, 35 Atl. 777.

<sup>57</sup> Inhabitants of Essex v. Low, 5 Allen (Mass.) 595; Board of Education v. Board of Education, 41 Ohio St. 680; City of Winona v. School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687.

<sup>58</sup> Mayhew v. Gay Head Dist., 13 Allen (Mass.) 129; Embler v. COOL.MUN.CORP.—5

tion in control of the territory, unless the territory and population of the new municipality are substantially the same as the old corporation.<sup>59</sup>

The Legislature may, however, by general or special law apportion the property and debts between the two corporations in its discretion.<sup>60</sup>

Town of Wallkill, 132 N. Y. 222, 30 N. E. 404; *Goodhue v. Town of Beloit*, 21 Wis. 636; *City of Winona v. School Dist. No. 82*, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687. But see *Brown v. Milliken*, 42 Kan. 769, 23 Pac. 167; *Maumee School Tp. v. School Town of Shirley City*, 159 Ind. 423, 65 N. E. 285.

<sup>59</sup> *Rose v. Hawley*, 118 N. Y. 502, 23 N. E. 904; *Washburn Waterworks Co. v. City of Washburn*, 129 Wis. 73, 108 N. W. 194; *Laird v. City of De Soto* (C. C.) 22 Fed. 421; *Id.* (C. C.) 23 Fed. 780; *Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172; *Town of Watervliet v. Town of Colonie*, 27 App. Div. 394, 50 N. Y. Supp. 487; *Ranken v. McCallum*, 25 Tex. Civ. App. 83, 60 S. W. 975. When the pre-existing organization was neither a corporation de jure nor a corporation de facto, its de facto or de jure successor is not liable for its debts. *City of Guthrie v. Wylie*, 6 Okl. 61, 55 Pac. 103.

<sup>60</sup> *Appeal of Borough of Dunmore*, 52 Pa. 374; *Bradish v. Lucken*, 38 Minn. 186, 36 N. W. 454; *RUMSEY v. TOWN OF SAUK CENTRE*, 59 Minn. 316, 61 N. W. 330, *Cooley, Cas. Mun. Corp.* 33; *Mayor, etc., of City of Hoboken v. Ivison*, 29 N. J. Law, 65; *Darby Tp. v. Borough of Lansdowne*, 174 Pa. 203, 34 Atl. 574; *Town of Humboldt v. City of Barnesville*, 83 Minn. 219, 86 N. W. 87.

## CHAPTER III

### LEGISLATIVE CONTROL

22. Legislative Control in General.
23. Limitations on Legislative Control.
24. Offices and Officers.
25. Public Funds and Revenues.
26. Contracts and Obligations.
27. Obligations Imposed by Legislature.
28. Property.
29. Franchises.
30. Public Thoroughfares.

### LEGISLATIVE CONTROL IN GENERAL

22. The state Legislature, by virtue of its sovereign powers, may exercise supervisory control over the governmental functions, public affairs, and property of a municipal corporation, subject only to such limitations as may be imposed by the state and federal Constitutions.

During its existence a municipal corporation is subject to a large measure of legislative control. This follows as a necessary corollary of the legislative power to create such corporations. They are, as we have seen, public agencies for the administration of government.<sup>1</sup> Primarily and chiefly, they are organized to promote the welfare of the citizens of the municipality.<sup>2</sup> They are rarely established for rural communities, but are demanded by the necessities of urban life.<sup>3</sup> A municipal corporation is peculiarly a govern-

<sup>1</sup> 2 Kent, Comm. 275; People v. Morris, 13 Wend. (N. Y.) 325.

<sup>2</sup> 1 Dill. Mun. Corp. §§ 12, 20; People v. Morris, *supra*; City of Philadelphia v. Fox, 64 Pa. 180; East Tennessee University v. Mayor, etc., of City of Knoxville, 6 Baxt. (Tenn.) 166.

<sup>3</sup> State ex rel. Attorney General v. Schweickardt, 109 Mo. 496, 19 S. W. 47; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

"The fundamental idea of a municipal corporation, proper, both

ment of the people, by the people, and for the people residing within the corporate limits.<sup>4</sup> And yet one of the chief functions of such a corporation is the due enforcement of certain criminal laws of the state, and the local exercise of the police power thereof.<sup>5</sup> Not only the citizens of the municipality, but all who come within its boundaries, are subject to its jurisdiction. Its authority extends over these as well as the persons who are either permanently or temporarily within this jurisdiction.<sup>6</sup> The exercise of its functions requires lands,

in England and in this country, is to invest compact or dense populations with the power of local self-government. Indeed, the necessity for such corporations springs from the existence of centers or agglomerations of population, having, by reason of density and numbers, local or peculiar interests and wants, not common to adjoining sparsely settled or agricultural regions. It is necessary to draw the line which divides the limits of the place and people to be incorporated. This is with us a legislative function." 1 Dill. Mun. Corp. § 183.

<sup>4</sup> Cooley, Const. Lim. (6th Ed.) 139; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>5</sup> State v. Pender, 66 N. C. 313; Egleston v. City Council of Charleston, 1 Mill. Const. (S. C.) 45; City Council of Charleston v. King, 4 McCord (S. C.) 487; City Council of Charleston v. Pepper, 1 Rich. (S. C.) 364; Rector v. State, 6 Ark. 187; Lewis v. State, 21 Ark. 209; Durr v. Howard, 6 Ark. 461; Ex parte Slattery, 3 Ark. 484; Smith, Mun. Corp. § 1320; Elliott, Mun. Corp. § 89; Commonwealth v. Roark, 8 Cush. (Mass.) 210; Commonwealth v. Pindar, 11 Metc. (Mass.) 539; Brown's Case, 152 Mass. 1, 24 N. E. 857; Myers v. People, 26 Ill. 173; Borough of St. Peter v. Bauer, 19 Minn. 327 (Gil. 282); People v. Wong Wang, 92 Cal. 277, 28 Pac. 270; People v. Ah Ung, 92 Cal. xix, 28 Pac. 272; State v. Cram, 84 Me. 271, 24 Atl. 853; People v. Gooseman, 80 Mich. 611, 45 N. W. 369; People v. Brown, 80 Mich. 615, 45 N. W. 371; People v. Hulett, 61 Hun, 620, 15 N. Y. Supp. 630. See, also, Cranston v. Mayor, etc., of City of Augusta, 61 Ga. 572; Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; People v. Bennett, 83 Mich. 457, 47 N. W. 250; Ogden City v. McLaughlin, 5 Utah, 387, 16 Pac. 721; State v. Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279; Welch v. City of Boston, 126 Mass. 442, note.

<sup>6</sup> The people coming within the limits of the city are regarded for

goods, chattels, and money. The corporation must buy and sell.<sup>7</sup> It incurs obligations which must be discharged. This property and these obligations may be strictly municipal, or they may be public in the wider sense. Out of this complex body, with its varied powers, purposes, and properties, and the administration of its affairs, must arise, therefore, many kinds of local rights, powers, and obligations, conflicting and complicated.

#### *Classes of Powers, Franchises and Property*

The Legislature is the supreme trustee for the people of all public powers, rights, and property. The municipality is the local general agent of the state for governmental purposes. It has powers, franchises, and property of two classes: (1) Those held and exercised for the welfare of the general public; (2) those held and exercised for the local benefit of the municipality and its inhabitants. The former are subject to the unlimited control of the Legislature; the latter are not thus subject. But the state may administer these trusts and affairs through other agencies than said municipality for the benefit of the *cestuis qui trustent*.<sup>8</sup>

the time being as inhabitants, and liable in the same manner for violations of laws. *Heland v. City of Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670; *Mayor, etc., of City of Knoxville v. King*, 7 Lea (Tenn.) 441; *Village of Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *City Council of Charleston v. Pepper*, 1 Rich. (S. C.) 364; *Strauss v. Town of Pontiac*, 40 Ill. 301; *Horney v. Sloan, Smith (Ind.)* 136; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *In re Vandine*, 6 Pick. (Mass.) 187, 17 Am. Dec. 351; *Gosselink v. Campbell*, 4 Clarke (4 Iowa) 296; *Kennedy v. Sowden*, 1 McMul. (S. C.) 323.

<sup>7</sup> Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515; *Ketchum v. City of Buffalo*, 14 N. Y. 356; Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42, 26 N. E. 239; *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; *Richmond & W. P. Land, Navigation & Improvement Co. v. Town of West Point*, 94 Va. 668, 27 S. E. 460; *McDonogh's Ex'r v. Murdoch*, 15 How. (U. S.) 367, 14 L. Ed. 732.

<sup>8</sup> *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248; *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 South. 590; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12

In so far as its governmental aspects are concerned, the corporation is subject to legislative will.<sup>9</sup> This paramount power of the state manifests itself in the alteration, consolidation, and dissolution of municipal corporations,<sup>10</sup> the appointment and control of public officers,<sup>11</sup> the imposition on the municipality of public burdens and obligations,<sup>12</sup> the control and appropriation of public revenues,<sup>13</sup> the control of public improvements,<sup>14</sup> and of public property<sup>15</sup> and franchises.<sup>16</sup> In short, the state acts as general guardian of the person and property of the municipal corporation, subject only to such limitations as may be imposed by the state and federal Constitutions.

Pac. 265, 58 Am. Rep. 299; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *City of Council Bluffs v. Kansas City*, St. J. & C. B. R. Co., 45 Iowa, 358, 24 Am. Rep. 773; *People v. Kerr*, 27 N. Y. 188; *Daley v. City of St. Paul*, 7 Minn. 390 (Gil. 311); *City of Philadelphia v. Fox*, 64 Pa. 169.

<sup>9</sup> *City of San Francisco v. Canavan*, 42 Cal. 541; *City of Colorado Springs v. Neville*, 42 Colo. 219, 93 Pac. 1096; *Town of Cicero v. City of Chicago*, 182 Ill. 301, 55 N. E. 351; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Attorney General ex rel. Battishill v. Township Board of Springwells*, 143 Mich. 523, 107 N. W. 87; *Allison v. Welde*, 172 N. Y. 421, 65 N. E. 421; *New Orleans M. & C. R. Co. v. City of New Orleans*, 26 La. Ann. 478; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699; *Cooley, Cas. Mun. Corp.* 74; *State ex rel. Hostetter v. Holden*, 19 Neb. 249, 27 N. W. 120; *Booth v. McGuinness*, 78 N. J. Law, 346, 75 Atl. 455; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103, *Cooley, Cas. Mun. Corp.* 36; *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801; *Wharton v. City of Greensboro*, 146 N. C. 356, 59 S. E. 1043; *Nichol v. Mayor, etc., of Town of Nashville*, 9 Humph. (28 Tenn.) 252; *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 481; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Schigley v. City of Waseca*, 106 Minn. 94, 118 N. W. 259, 19 L. R. A. (N. S.) 689, 16 Ann. Cas. 169.

<sup>10</sup> See post, §§ 31-37.

<sup>11</sup> See post, § 24.

<sup>12</sup> See post, § 27.

<sup>13</sup> See post, § 25.

<sup>14</sup> See post, §§ 85-92.

<sup>15</sup> See post, § 28.

<sup>16</sup> See post, § 29.

## LIMITATIONS ON LEGISLATIVE CONTROL

23. The extent of control which the Legislature may exercise over municipal corporations may be and usually is limited by the Constitution and by the nature of the rights and powers exercised by the municipality.

Though the power of the Legislature to exercise general supervisory control over municipal corporations is recognized, that power is subject to certain limitations. Thus, there are certain provisions of both the federal and state Constitutions which must always be considered in determining the extent to which the Legislature may go in its attempts to control. Among these constitutional limitations are the provisions relating to the protection of private property<sup>17</sup> and those preventing the impairment of contractual obligations,<sup>18</sup> provisions which operate especially to protect the rights of creditors of the municipality. Under the guise of legislative control, a private citizen cannot be deprived by an act of the Legislature of any of his rights against a municipal corporation.<sup>19</sup> Other important constitutional provisions calculated to limit the powers of the Legislature are those prescribing uniformity of laws and prohibiting special or local legislation.<sup>20</sup>

<sup>17</sup> Grogan v. City of San Francisco, 18 Cal. 590; Webb v. Mayor, etc., of City of New York, 64 How. Prac. (N. Y.) 10.

<sup>18</sup> SHAPLEIGH v. SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197.

<sup>19</sup> McSurely v. McGrew, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248.

<sup>20</sup> People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; People ex rel. Miller v. Cooper, 83 Ill. 585; New Brunswick v. Fitzgerald, 48 N. J. Law, 457, 8 Atl. 729; Pell v. Mayor, etc., of City of Newark, 40 N. J. Law, 71, 29 Am. Rep. 266; Id., 40 N. J. Law, 550; Koester v. Com'rs of Atchison County, 44 Kan. 141, 24 Pac. 65; Smith v. Sherry, 50 Wis. 210, 6 N. W. 561; City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; Edmonds v. Herbrandson, 2

An important limitation on the power of the Legislature is the principle, generally recognized, though not always expressly declared, that the people are entitled to local self-government. In recognition of this principle it has been declared in some jurisdictions that the right of local self-government cannot be taken away from municipalities by act of the Legislature,<sup>21</sup> though this principle has been denied in a few jurisdictions.<sup>22</sup>

As has been pointed out in the preceding section, municipal corporations present a dual aspect, and exercise their functions in a dual capacity. The exercise of legislative control over these corporations is, therefore, further limited by the nature of the rights and powers sought to be controlled. A municipal corporation possesses two classes of powers and two classes of rights—public and private. In all that relates to the one class, it is merely the agent of the state, and therefore subject to its control. In the other, it is the agent of the inhabitants of the place, and maintains the character and relations of an individual, and is not subject to the absolute control of the Legislature.<sup>23</sup>

In this aspect the municipality is regarded as a distinct le-

N. D. 270, 50 N. W. 970, 14 L. R. A. 725; Huntington v. City of Nevada (C. C.) 75 Fed. 60; Id., 82 Fed. 1002, 27 C. C. A. 681.

<sup>21</sup> State ex rel. Attorney General v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; People ex rel. Attorney General v. Common Council of Detroit, 29 Mich. 108; Scott v. Village of Saratoga Springs, 199 N. Y. 178, 92 N. E. 393; City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

<sup>22</sup> Adams v. Kuykendall, 88 Miss. 571, 35 South. 830; Ancrum v. Camden Water, Light & Ice Co., 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029.

<sup>23</sup> People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; McSurely v. McGrew, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas>Mun. Corp. 4; State ex rel. White v Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222.

gal personality, having the rights and powers of a private, as distinguished from a public, corporation.<sup>24</sup> The boundary between the domain of the state and that of local powers is indistinct and often difficult to trace; but the presumption is that the Legislature intends to keep within the limits of its authority, and when legislation is attacked as an infringement on the right of municipal self-government, more than usual force will be allowed to the legislative judgment as to what is admissible and proper in the particular case.<sup>25</sup>

### OFFICES AND OFFICERS

24. In the absence of constitutional inhibition, the Legislature has unlimited power of control over those municipal officers who are charged with the performance of governmental functions devolved upon it, but cannot interfere with those officers who perform functions of a distinctly municipal character.

The territory within which a municipal government is exercised is still a part of the state, and for all purposes other than those purely municipal is subject to the control of the state. The state, therefore, through the Legislature, has the right to the appointment, election, tenure of office, and compensation of all officers that may be required to execute its general laws or to perform functions pertaining to the government of the state and not of a municipal nature.<sup>26</sup> On the other hand, it is equally well recognized that, in view of the fundamental right to local self-government, officers exercising purely municipal and local functions should be free from legislative control.<sup>27</sup>

<sup>24</sup> Dill. Mun. Corp. (1st Ed.) p. 83.

<sup>25</sup> People ex rel. Attorney General v. Common Council of Detroit, 29 Mich. 108.

<sup>26</sup> Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620.

<sup>27</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; State ex rel. Holt v. Denny,

The chief difficulty is to determine what officers are governmental and what are municipal. Upon this line of contention the courts of various states have divided as to committees for parks and streets and water supply.<sup>28</sup> On the other hand, the administration of justice and the preservation of public peace are regarded as matters essentially of public concern. There is, therefore, a general unanimity of opinion that the Legislature may provide for the appointment of the members of a municipal police force by a board of commissioners.<sup>29</sup> But the mayor,<sup>30</sup> the fire department,<sup>31</sup> and the

118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; State ex rel. Attorney General v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; People v. Albertson, 55 N. Y. 50; State ex rel. Hamilton v. Krez, 88 Wis. 135, 59 N. W. 593. But see Lambert v. Norman, 119 Ga. 351, 46 S. E. 433; Scott v. Village of Saratoga Springs, 199 N. Y. 178, 92 N. E. 393, affirming 131 App. Div. 347, 115 N. Y. Supp. 796.

<sup>28</sup> People v. Draper, 15 N. Y. 532; Daley v. City of St. Paul, 7 Minn. 390 (Gil. 311); St. Louis County Court v. Griswold, 58 Mo. 175. See, also, People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; People v. Albertson, 55 N. Y. 50; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; State v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; State ex rel. White v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222.

<sup>29</sup> City of Americus v. Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S. W. 524; Gooch v. Town of Exeter, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637; Horton v. City Council and City Treasurer of Newpört, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. (N. S.) 512, 8 Ann. Cas. 1097; Mayor, etc., of Baltimore v. State ex rel. Board of Police of City of Bal-

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<sup>30</sup> Britton v. Steber, 62 Mo. 370; State ex rel. Wingate v. Valle, 41 Mo. 29. And see Scott v. Village of Saratoga Springs, 199 N. Y. 178, 92 N. E. 393, affirming 131 App. Div. 347, 115 N. Y. Supp. 796. But compare Attorney General ex rel. Moreland v. Common Council of City of Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211; Lambert v. Norman, 119 Ga. 351, 46 S. E. 433.

<sup>31</sup> City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; State ex rel. Attorney General v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; City of Lexington v. Thompson; 113 Ky. 540, 68 S. W. 477, 57 L. R. A. 775, 101 Am. St. Rep. 361.

board of public works<sup>32</sup> are regarded as exercising municipal functions and are not subject to state control.

### PUBLIC FUNDS AND REVENUES

25. The Legislature has the same power over the public revenues of a municipality as over the immediate funds of the state, and in the exercise of this authority it may appropriate these revenues to any public purpose conducive to the public good.

The ordinary revenues of a city are not its property in the sense in which private property is held by an individual.<sup>33</sup>

timore, 15 Md. 376, 74 Am. Dec. 572; People v. Draper, 15 N. Y. 532; People v. Albertson, 55 N. Y. 50; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; Burch v. Hardwicke, 30 Grat. (Va.) 24, 32 Am. Rep. 640; People ex rel. McCagg v. Mayor, etc., of City of Chicago, 51 Ill. 17, 2 Am. Rep. 278; People v. McDonald, 69 N. Y. 362; People ex rel. Drake v. Mahaney, 13 Mich. 481; State ex rel. Attorney General v. Covington, 29 Ohio St. 102; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; State v. Hunter, 38 Kan. 578, 17 Pac. 177. But see City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

"The power of the Legislature to provide for the appointment of the members of a municipal board of police has been affirmed in every instance in which it has been so challenged and presented as to require the judgment of courts. Those courts which hold to the doctrine that the control of matters of purely local concern cannot be taken from the people of the locality place their decisions upon the ground that the selection of purely peace officers is not a local matter, but is one of state concern, inasmuch as such officers belong to the constabulary of the state. But while the reasoning of the courts is diverse, the ultimate conclusion reached by all the cases is the same." Elliott, C. J., in State v. Kolsen, 130 Ind. 434, 29 N. E. 593, 14 L. R. A. 566.

<sup>32</sup> Moreland v. Millen, 126 Mich. 381, 85 N. W. 882; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4.

<sup>33</sup> Creighton v. Board of Sup'r's of City and County of San Francisco, 42 Cal. 446; Board of Sup'r's of Sangamon County v. City of Springfield, 63 Ill. 66.

Such revenues belong to the public, and the collection and appropriation thereof by a city is the exercise of a trust function by the municipality for the benefit of the public. The Legislature is the representative of the public in this as well as other matters, and it may change these public revenues from one public object to another at its discretion.<sup>34</sup> The doctrine is generally recognized that no municipal corporation can have any vested right in the powers conferred upon it for governmental purposes.<sup>35</sup> Therefore revenues raised by taxation, though levied for specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the municipality.<sup>36</sup> In an early Illinois case it was decided that the Legislature had authority to repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, the fees of which were directed to be

<sup>34</sup> *Creighton v. Board of Sup'rs of City and County of San Fran-* c<sup>c</sup> co, 42 Cal. 446; *State ex rel. Lynn v. Board of Education of City of St. Louis*, 141 Mo. 45, 41 S. W. 924. In *Board of Sup'rs of Sangamon County v. City of Springfield*, 63 Ill. 66, it was held that the revenues are the result of taxation exercised for the public good, and the public interest requires that the Legislature shall have power to direct and control their application.

<sup>35</sup> *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; *People v. Morris*, 13 Wend. (N. Y.) 335. In *City of St. Louis v. Sheilds*, 52 Mo. 351, the court said: "It is an unsound and even absurd proposition that political power conferred by the Legislature can become a vested right, as against the government, in any individual or body of men." See, also, *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. Ed. 403.

<sup>36</sup> *People ex rel. City of Springfield v. Power*, 25 Ill. 187; *State ex rel. Lynn v. Board of Education of City of St. Louis*, 141 Mo. 45, 41 S. W. 924; *Edmondson v. Board of Education of City of Memphis*, 108 Tenn. 557, 69 S. W. 274, 58 L. R. A. 170; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535, 18 L. Ed. 403. "However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principles which secure the inviolability of contracts." *United States ex rel. Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395. But see *Board of Education of Covington v. Board of Trustees of Public Library of City of Covington*, 113 Ky. 234, 68 S. W. 10; *State ex rel. Board of Education of City of Oshkosh v. Haben*, 22 Wis. 660.

appropriated to the support of city paupers, Judge Caton in the opinion remarking that the charter power to license "gives the city no more a vested right to issue licenses because the Legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city."<sup>37</sup> When the city of Lafayette was consolidated with New Orleans it was provided that the respective obligations of the two cities should rest upon and be borne by the former territory of the two cities severally; but this just and equitable arrangement was, over the protest of the people of Lafayette, whose burden had been light, soon changed by a statutory provision requiring all portions of the consolidated city to bear equal parts of taxation. The Supreme Court of Louisiana answered the complaint of the citizens of Lafayette with a repetition of the fundamental doctrine that public corporations are wholly under the control of the Legislature, and it may provide in what manner taxes shall be levied to support them and pay their debts.<sup>38</sup>

#### *Authority in Public Matters Only*

This power of the Legislature to control municipal funds applies only to the strictly public or governmental revenues of the city, and rests obviously upon the sovereign legislative power of the state in all public matters.<sup>39</sup> This power of control does not exist with regard to property in which the municipality has a private interest or creditors have a vested right.<sup>40</sup> Public revenues, however, are not regarded as pri-

<sup>37</sup> Gutzweller v. People, 14 Ill. 142. See, also, Board of Sup'rs of Sangamon County v. City of Springfield, 63 Ill. 66; Richland County v. Lawrence County, 12 Ill. 1.

<sup>38</sup> Layton v. City of New Orleans, 12 La. Ann. 515.

<sup>39</sup> McDonald v. City of Louisville, 113 Ky. 425, 68 S. W. 413; Blades v. Board of Water Com'rs of City of Detroit, 122 Mich. 366, 81 N. W. 271; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765.

<sup>40</sup> State ex rel. Marchand v. City of New Orleans, 37 La. Ann. 13; United States ex rel. Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U.

vate property, nor has any one a vested right in them until after their actual appropriation.<sup>41</sup> That this power pertains to public benefits was judicially declared and maintained in the celebrated case of State v. Railroad Co., decided by the Supreme Court of Maryland in 1842, and affirmed by the Supreme Court of the United States in 1844.<sup>42</sup> The railroad company accepted a charter requiring it to locate and build its road through three certain towns, upon penalty, in case of failure, that it should forfeit \$1,000,000 to the state of Maryland for the use of Washington county. After action brought to recover the penalty, the Legislature repealed that clause of the charter which imposed the penalty, and thereupon, under a plea *puis darrein continuance*, it was held that the county could not recover, as the forfeiture was in the right of the state; and the penalty was released.<sup>43</sup> Here again it was declared that the corporation had no vested right in such a fund as this, but that the same was under the sovereign control of the Legislature.

#### *Examples of Power*

This is the general rule with regard to public property owned and controlled by the municipality as trustee or representative of the public for public use, which could not be held by private individuals for such use. As a consequence, the Legislature has full power over the revenues of a corporation, the

S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 17 L. Ed. 305; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

<sup>41</sup> *Memphis v. United States ex rel. Brown*, 97 U. S. 293, 24 L. Ed. 920; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *Pereles v. City of Watertown*, 6 Biss. 79, Fed. Cas. No. 10,980.

<sup>42</sup> *State, to Use of Washington County, v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319, affirmed 3 How. 534, 11 L. Ed. 714.

<sup>43</sup> *State, to Use of Washington County, v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319, affirmed 3 How. (U. S.) 534, 11 L. Ed. 714.

source of which it may prescribe and alter at its pleasure.<sup>44</sup> It may give or it may withhold, for example, the power to grant and tax licenses for various occupations;<sup>45</sup> also the power to levy and collect wharfage or ferriage,<sup>46</sup> or penalties for breach of law or of contract.<sup>47</sup> It may ratify void local assessments;<sup>48</sup> it may compel the satisfaction by the city of nonlegal claims against it;<sup>49</sup> it may regulate the use of streets,

<sup>44</sup> *Carondelet Canal Nav. Co. v. City of New Orleans*, 44 La. Ann. 394, 10 South. 871; *McSurely v. McGrew*, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; *People ex rel. Oak Hill Cemetery Ass'n v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *McGee v. City of Salem*, 149 Mass. 238, 21 N. E. 386; *Northampton County v. Easton Pass. Ry. Co.*, 148 Pa. 282, 23 Atl. 895; *Lucas v. Board of Com'rs of Tippecanoe County*, 44 Ind. 524; *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245; *Anderson v. City of Mayfield*, 93 Ky. 230, 19 S. W. 598; *Tice v. City of Mayfield*, 93 Ky. 230, 19 S. W. 598; *People v. Fields*, 58 N. Y. 491; *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116, 23 L. Ed. 825; *Terrel v. Wheeler*, 123 N. Y. 76, 25 N. E. 329; *Youngs v. Hall*, 9 Nev. 212; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Board of Education v. Commissioners*, 107 N. C. 110, 12 S. E. 190; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446; *Love v. Schenck*, 34 N. C. 304.

<sup>45</sup> *Board of Sup'rs of Sangamon County v. City of Springfield*, 63 Ill. 71; *City of Richmond v. Richmond & D. R. Co.*, 21 Grat. (Va.) 604; *People v. Meyer* (Sup.) 5 N. Y. Supp. 69; *People ex rel. City of Springfield v. Power*, 25 Ill. 187; *Richland County v. Lawrence County*, 12 Ill. 1; *Mendocino County v. Bank of Mendocino*, 86 Cal. 255, 24 Pac. 1002; *Grantham v. State*, 89 Ga. 121, 14 S. E. 892; *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. Ed. 825.

<sup>46</sup> *City of St. Louis v. Sheilds*, 52 Mo. 351.

<sup>47</sup> *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *State, to Use of Washington County, v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; *Maryland v. Same*, 3 How. (U. S.) 534, 11 L. Ed. 714; *Holliday v. People*, 5 Gilman (Ill.) 216; *Conner v. Bent*, 1 Mo. 235; *Coles v. Madison County, Breese* (Ill.) 154, 12 Am. Dec. 161; *Chicago & A. R. Co. v. Adler*, 56 Ill. 344.

<sup>48</sup> *Mayor, etc., of Baltimore v. Horn*, 26 Md. 194; *Great Falls Ice Co. v. District of Columbia*, 19 D. C. 327; *Lennon v. Mayor, etc., of City of New York*, 55 N. Y. 361.

<sup>49</sup> *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Creighton v. Board of Sup'rs of City and County of San Francisco*, 42 Cal. 446; *People ex rel. New York Electric Lines v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 654, 24 L. Ed. 521, *Cooley*, Cas. Mun. Corp. 46; *MERCHANTS' NAT. BANK OF ST. PAUL v. CITY OF EAST GRAND FORKS*, 94 Minn. 246, 102 N. W. 103, *Cooley*, Cas. Mun. Corp. 49; *Cooper v. Springer*,

highways, and other public places;<sup>50</sup> it may transfer the control of the parks, streets, and other public places to a board of commissioners appointed by the state.<sup>51</sup> It may also create and appoint a board of police commissioners, and regulate the compensation for them and for the police officers of the municipality, and compel their payment out of the municipal treasury.<sup>52</sup> To the contention that taxation and representation go together, the Supreme Court of Maryland replied: "Every city is represented in the state Legislature, and it is for that body to determine how much power shall be conferred by the municipal charters which it grants, and to fix the salary which police officers shall receive, and to require a payment by those who get the benefit of their services."<sup>53</sup>

65 N. J. Law, 594, 48 Atl. 605; *Town of Guilford v. Board of Sup'rs of Chenango County*, 13 N. Y. 143; *People v. Board of Sup'rs of Essex County*, 70 N. Y. 228; *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462; *Smith v. Morse*, 2 Cal. 524; *Grogan v. City of San Francisco*, 18 Cal. 590; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Wilder v. City of East St. Louis*, 55 Ill. 133; *United States v. Baltimore & O. R. Co.*, 17 Wall. (U. S.) 322, 21 L. Ed. 597; *City of Philadelphia v. Field*, 58 Pa. 320; *Mayor, etc., of Baltimore v. State ex rel. Board of Police of City of Baltimore*, 15 Md. 376, 74 Am. Dec. 572; *Mayor, etc., of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *People v. Mayor, etc., of City of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *State ex rel. Arick v. Hampton*, 13 Nev. 441; *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 141; *People ex rel. Blanding v. Burr*, 13 Cal. 343.

The Legislature has power to charge the payment of a deficiency against a city for liability incurred in excess of its charter limitation, so far as the claims are based on an equitable or a legal ground. *City of Syracuse v. Hubbard*, 64 App. Div. 587, 72 N. Y. Supp. 802.

<sup>50</sup> *Appeal of McGee*, 114 Pa. 470, 8 Atl. 237; *People ex rel. Bransom v. Walsh*, 96 Ill. 232, 36 Am. Rep. 185; *People v. New York & H. R. Co.*, 45 Barb. (N. Y.) 73; *SIMON v. NORTHUP*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171, Cooley, Cas. Mun. Corp. 57.

<sup>51</sup> *People ex rel. Bransom v. Walsh*, *supra*; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155.

<sup>52</sup> *Mayor, etc., of Baltimore v. State ex rel. Board of Police of City of Baltimore*, 15 Md. 376, 74 Am. Dec. 572; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *People v. Draper*, 15 N. Y. 532.

<sup>53</sup> *Mayor, etc., of Baltimore v. State ex rel. Board of Police of City of Baltimore*, 15 Md. 376, 74 Am. Dec. 572.

In short, it has been repeatedly adjudicated that the Legislature has the same power over the revenues of the municipality that it has over the funds of the state, and may thus direct their application to such purposes as it deems appropriate for the public welfare.<sup>54</sup>

In the exercise of legislative authority over municipal funds and revenues, the same uncertainties, limitations, and variations along the indefinite boundary line between governmental and municipal functions may be observed as have been mentioned hitherto. Thus, in California, the imposition of a license tax on a business or occupation is a municipal affair.<sup>55</sup> In Kentucky, the Legislature may impose local taxes to carry out local enterprises, such as the construction of a railroad.<sup>56</sup> In Michigan, a municipality may be required to pay money to the credit of the board of health,<sup>57</sup> but not to expend money for purely local improvements.<sup>58</sup> Other instances of like character may be found in the decisions of the various courts.<sup>59</sup>

<sup>54</sup> Richland County v. Lawrence County, 12 Ill. 1; Palmer v. Fitts, 51 Ala. 489; City of Chicago v. Cook County, 106 Ill. App. 47; State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S. W. 524; Payne v. Treadwell, 16 Cal. 220; City of San Francisco v. Canavan, 42 Cal. 541; Rawson v. Spencer, 113 Mass. 40; Weymouth & B. Fire Dist. v. Norfolk County Com'rs, 108 Mass. 142; Town of Beloit v. Morgan, 7 Wall. (U. S.) 619, 19 L. Ed. 205; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; Trustees of Schools v. Tatman, 13 Ill. 28; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; Love v. Schenck, 34 N. C. 304.

It is within the power of the Legislature to impose a tax upon a particular subdivision of a municipality of the state when in its judgment it is for the benefit of the locality as well as of the state at large. Young v. City of Kansas City, 152 Mo. 661, 54 S. W. 535; Elliott v. City of Kansas City, 152 Mo. 667, 54 S. W. 1103. See Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

<sup>55</sup> Ex parte Helm, 143 Cal. 553, 77 Pac. 453.

<sup>56</sup> Slack v. Maysville & L. R. Co., 13 B. Mon. 1.

<sup>57</sup> Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

<sup>58</sup> People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>59</sup> State ex rel. Board of School Directors v. City of New Orleans, 42 La. Ann. 92, 7 South. 674; Elting v. Hickman, 172 Mo. 237, 72 S. W. 700; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 49 Pac.

*Political Power Conferred Not a Vested Right*

All of these powers, and many others pertaining to the contracts and obligations of the city, are based upon the proposition that political power conferred by the Legislature cannot become a vested right, as against the government, in any individual or body of men.<sup>60</sup> Such power exists subject to the legislative will, and may be withdrawn at any time, subject to constitutional limitations; and so far has this doctrine been carried in Iowa,<sup>61</sup> and some other states, that it has been held that the Legislature may compel a city to pay a debt incurred by a municipality in excess of the legislative limitation upon indebtedness, which is a very practical overruling of the doctrine of ultra vires. If the limitation be placed by Constitution, such power does not exist in the Legislature.<sup>62</sup> So, too, the Legislature may direct and levy compulsory taxes upon a corporation when necessary to perform its duties or discharge its valid obligations.<sup>63</sup> Likewise the state may compel the assessment and disbursement of public revenue for

382, 37 L. R. A. 412; O'Neill v. City of Hoboken, 72 N. J. Law, 67, 60 Atl. 50.

<sup>60</sup> United States ex rel. Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; People v. Morris, 13 Wend. (N. Y.) 335.

<sup>61</sup> Scott v. City of Davenport, 34 Iowa, 208; City of Syracuse v. Hubbard, 64 App. Div. 587, 72 N. Y. Supp. 802; Mosher v. Independent School Dist. of Ackley, 44 Iowa, 122.

<sup>62</sup> CITY OF NEW ORLEANS v. CLARK, 95 U. S. 644, 24 L. Ed. 521, Cooley, Cas. Mun. Corp. 46; Creighton v. Board of Sup'rs of City and County of San Francisco, 42 Cal. 446; In re Opinion of the Justices, 99 Me. 515, 60 Atl. 85. And see City of Guthrie v. New Vienna Bank, 4 Okl. 194, 38 Pac. 4.

<sup>63</sup> Memphis v. Brown, 97 U. S. 300, 24 L. Ed. 924; Vance v. City of Little Rock, 30 Ark. 435, 439; CITY OF NEW ORLEANS v. CLARK, 95 U. S. 644, 24 L. Ed. 521, Cooley, Cas. Mun. Corp. 46; Layton v. New Orleans, 12 La. Ann. 515; Eschenburg v. Board of Com'rs of Lake County, 129 Ind. 398, 28 N. E. 865; Maltby v. Tautges, 50 Minn. 248, 52 N. W. 858; Hawkins v. Intendant, etc., of Town of Jonesboro, 63 Ga. 527; Little v. Committee of Union Tp., 40 N. J. Law, 397; City of San Francisco v. Canavan, 42 Cal. 541; Carpenter v. People, 8 Colo. 116, 5 Pac. 828; MT. PLEASANT v. BECKWITH, 100 U. S. 514, 25 L. Ed. 699, Cooley, Cas. Mun. Corp. 74.

the erection and support of schoolhouses and schools,<sup>64</sup> public highways,<sup>65</sup> bridges, and canals,<sup>66</sup> or any other matters which are state concerns as distinguished from municipal.

## CONTRACTS AND OBLIGATIONS

26. The legislative power of the state over the contracts and obligations of municipalities is limited by the vested rights of third parties, and the prohibitions found in many of the state constitutions. Subject to these limitations, the state has control over the contracts and obligations of a municipality.

As a general rule, subject, however, to certain well-defined limitations, the state Legislature has general supervision and control over municipal contracts and obligations.<sup>67</sup> The Legislature may prescribe the mode by which municipalities may enter into contracts and the limit of their power of contracting.<sup>68</sup> It may forbid municipal contracts with municipal officers who have the power to make contracts,<sup>69</sup> and may prescribe the terms on which and the objects for which a municipality may make contracts.<sup>70</sup> But the contracts of municipi-

<sup>64</sup> State ex rel. Snone v. Blue, 122 Ind. 600, 23 N. E. 963; State Board of Education v. City of Aberdeen, 56 Miss. 518; School Dist. No. 1 v. Weber, 75 Mo. 558.

<sup>65</sup> People v. Board of Sup'rs of San Luis Obispo County, 50 Cal. 561; People v. Flagg, 46 N. Y. 401; Jensen v. Board of Sup'rs of Polk County, 47 Wis. 298, 2 N. W. 320.

<sup>66</sup> Guilder v. Town of Otsego, 20 Minn. 74 (Gil. 59); City of Philadelphia v. Field, 58 Pa. 320; SIMON v. NORTHUP, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171, Cooley, Cas. Mun. Corp. 57; Thomas v. Leland, 24 Wend. (N. Y.) 65; Pumphrey v. Mayor, etc., of Baltimore, 47 Md. 145, 28 Am. Rep. 446; City of Philadelphia v. Fox, 64 Pa. 169.

<sup>67</sup> State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

<sup>68</sup> Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. Ed. 229.

<sup>69</sup> Macy v. City of Duluth, 68 Minn. 452, 71 N. W. 687; West v. Berry, 98 Ga. 402, 25 S. E. 508; Benton v. Hamilton, 110 Ind. 294, 11 N. E. 238.

<sup>70</sup> Webster v. Town of Harwinton, 32 Conn. 131; Frost v. Inhabitants of Belmont, 6 Allen (Mass.) 152; Youngblood v. Sexton, 32

paliaries, when not ultra vires or otherwise invalid, are protected by the prohibition in the federal Constitution, against laws impairing the obligation of contracts.<sup>71</sup>

This rule has been repeatedly asserted by the courts when attempts have been made to limit the taxing power of the municipality on the faith of which contracts have been made. The following decisions may illustrate the judicial opinion upon these subjects: Parties who have become creditors of a municipal corporation upon the faith of the taxing power granted to it to meet its obligations may enforce the execution of this power by the appropriate process.<sup>72</sup> The taxing statute is thus held to be a part of the contract whose obligation cannot be impaired; but the mode of taxation may be altered if the change does not materially affect the creditors' security.<sup>73</sup> So, too, certain property may be made exempt from, which was originally subject to, taxation.<sup>74</sup> But where credit has been given to a municipality upon the faith of a statutory

Mich. 406, 20 Am. Rep. 654; CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; Reed v. City of Anoka, 85 Minn. 294, 88 N. W. 981; Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77.

<sup>71</sup> Board of Education of City and County of San Francisco v. Fowler, 19 Cal. 11; City of Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396; Smith v. City of Appleton, 19 Wis. 468; SHAPLEIGH v. SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319.

<sup>72</sup> Port of Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; Gilman v. Sheboygan, 2 Black (U. S.) 510, 17 L. Ed. 305; State ex rel. Marchand v. City of New Orleans, 37 La. Ann. 13; United States ex rel. Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321.

<sup>73</sup> People ex rel. McLane v. Bond, 10 Cal. 563; Cooley, Const. Lim. (6th Ed.) 347, 349.

<sup>74</sup> Cooley, Const. Lim. (6th Ed.) 348; Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; Gilman v. Sheboygan, 2 Black (U. S.) 510, 17 L. Ed. 305; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321.

provision that no further bonded indebtedness shall be contracted by the city, an injunction has been granted to restrain an increase of bonded indebtedness, upon the ground that it would impair the obligations of a contract.<sup>75</sup> So, also, creditors may acquire a vested right in a sinking fund provided for their security, so as to authorize them to call upon the courts to prevent any material change in its character, or diversion of it to other uses, since the law had pledged it to them for their security.<sup>76</sup>

### OBLIGATIONS IMPOSED BY LEGISLATURE

27. Upon the elementary principle that duty imposes obligation, the Legislature has authority to impose upon the corporation without its consent, and even against its protest, such obligations as will enable it to perform its public functions.

The courts generally recognize the rule that the Legislature may impose pecuniary burdens on the municipality. It has accordingly been held that for such purpose a city may be compelled to pay a debt in excess of a legislative limit of indebtedness, to levy and collect taxes and appropriate them to the building and repair of highways, bridges, and canals, as being matters of public, as distinguished from municipal, concern;<sup>77</sup> to expend money for the improvement of docks, wharves, and levees;<sup>78</sup> to collect and appropriate money for

<sup>75</sup> Smith v. City of Appleton, 19 Wis. 468.

<sup>76</sup> Board of Liquidators of City Debts v. Municipality No. 1, 6 La. Ann. 21; Kelly v. City of Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; People ex rel. McLane v. Bond, 10 Cal. 563.

<sup>77</sup> Thomas v. Leland, 24 Wend. (N. Y.) 65; People v. Board of Sup'rs of San Luis Obispo County, 50 Cal. 561; Jensen v. Board of Sup'rs of Polk County, 47 Wis. 298, 2 N. W. 320; People v. Flagg, 46 N. Y. 401. In one case this duty was enforced by mandamus at the instance of a private person not showing either interest or injury. Pumphrey v. Mayor, etc., of Baltimore, 47 Md. 145, 28 Am. Rep. 446.

<sup>78</sup> Eastern & A. R. Co. v. Central R. Co., 52 N. J. Law, 267, 19 Atl. 722.

the support of public schools of the city;<sup>79</sup> to provide for the distribution of money raised by taxation for school purposes after its collection;<sup>80</sup> to pay a just debt not enforceable in law or equity;<sup>81</sup> and to pay for property destroyed by a mob, without reference to its ability or exercise of diligence to prevent the destruction.<sup>82</sup>

The Legislature may impose on the municipality liability for injuries due to defects in streets or other causes,<sup>83</sup> and compel the payment of warrants issued under an illegal contract,<sup>84</sup> debts barred by the statute of limitations,<sup>85</sup> and debts con-

<sup>79</sup> State ex rel. Snone v. Blue, 122 Ind. 600, 23 N. E. 963; State ex rel. Clark v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240. And see State v. City of Lawrence, 79 Kan. 234, 100 Pac. 485, holding that the Legislature may compel a city where the State University is located to issue bonds in aid thereof.

<sup>80</sup> State Board of Education v. City of Aberdeen, 56 Miss. 518; School Dist. No. 1 v. Weber, 75 Mo. 558.

<sup>81</sup> Creighton v. Board of Sup'r's of City and County of San Francisco, 42 Cal. 446; Vasser v. George, 47 Miss. 713; Town of Guilford v. Cornell, 18 Barb. (N. Y.) 615; Hasbrouck v. City of Milwaukee, 21 Wis. 219; CITY OF NEW ORLEANS v. CLARK, 95 U. S. 644, 24 L. Ed. 521, Cooley, Cas. Mun. Corp. 46; Brewster v. City of Syracuse, 19 N. Y. 116; People v. Board of Sup'r's of Essex County, 70 N. Y. 228; City of Syracuse v. Hubbard, 64 App. Div. 587, 72 N. Y. Supp. 802; Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575; State ex rel. Arick v. Hampton, 13 Nev. 441. The following cases declare the right of the municipality to a trial in due course of law; Plimpton v. Town of Somerset, 33 Vt. 283; Sanborn v. Rice County Com'r's, 9 Minn. 273 (Gil. 258); State ex rel. McCurdy v. Tappan, 29 Wis. 664, 9 Am. Rep. 622. See, also, Cooley, Tax'n, 687.

<sup>82</sup> City of Chicago v. Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. Rep. 321.

<sup>83</sup> City of Colorado Springs v. Neville, 42 Colo. 219, 93 Pac. 1096; Winter v. City of Niagara Falls, 190 N. Y. 198, 82 N. E. 1101, 123 Am. St. Rep. 540, 13 Ann. Cas. 486; Walters v. City of Ottawa, 240 Ill. 259, 88 N. E. 651.

<sup>84</sup> MERCHANTS' NAT. BANK OF ST. PAUL v. CITY OF EAST GRAND FORKS, 94 Minn. 246, 102 N. W. 703, Cooley, Cas. Mun. Corp. 49.

<sup>85</sup> People ex rel. Kellner v. City of New York, 3 Misc. Rep. 131, 23 N. Y. Supp. 1060.

tracted by the illegally organized predecessor of the municipality.<sup>86</sup>

In a leading case the Supreme Court of New York has carried this doctrine to the extent of sustaining a statute passed levying a tax upon the property of a corporation, and appropriating the same to the payment of a private demand against the town, which had been expressly rejected by the voters of the town at an election held under legislative authority for that purpose, and intended as a settlement of the right.<sup>87</sup> Judge Cooley says this authority may be defended upon the ground that it is the duty of the state to enforce just obligations for the public benefit which have been incurred in the exercise of public power conferred upon a corporation.<sup>88</sup> But it is equally well settled by repeated decisions that it rests with the inhabitants of a municipality to determine conclusively whether a debt shall be incurred for purely municipal purposes;<sup>89</sup> also that a corporation cannot be compelled to become a stockholder in a railway company, or other private corporation;<sup>90</sup> and in the celebrated Detroit Park Case it was ruled that a public park was a matter of municipal concern, and that the levy of a tax for the purchase and improvement of such parks could not be enforced by the Legislature without the consent of the municipality.<sup>91</sup> The only exception to this wholesome

<sup>86</sup> MAYOR, ETC., OF CITY OF GUTHRIE v. TERRITORY, 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841, Cooley, Cas. Mun. Corp. 30, 52.

<sup>87</sup> Town of Guilford v. Cornell, 18 Barb. (N. Y.) 615; Compare State v. City of Lawrence, 79 Kan. 234, 100 Pac. 485. See, also, Carter v. Cambridge & B. Bridge Proprietors, 104 Mass. 236; CITY OF NEW ORLEANS v. CLARK, 95 U. S. 654, 24 L. Ed. 521, Cooley, Cas. Mun. Corp. 46; United States v. Railroad Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597; People ex rel. Blanding v. Burr, 13 Cal. 343; North Missouri R. Co. v. Maguire, 49 Mo. 490, 8 Am. Rep. 141.

<sup>88</sup> Cooley, Tax'n (2d Ed.) 685.

<sup>89</sup> People v. Harper, 91 Ill. 357; People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; Atkins v. Town of Randolph, 31 Vt. 226.

<sup>90</sup> People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

<sup>91</sup> People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

doctrine is to be found in the state of Pennsylvania, wherein under direct legislative act sustained by the courts, the people of Philadelphia were unwillingly compelled to pay hundreds of thousands of dollars annually for the erection of the city hall "upon a scale of magnificence better suited for the capital of an empire than the municipal buildings of a debt-burdened city."<sup>92</sup> The same act which declared that the city must have these fine buildings appointed certain citizens a body of commissioners for their erection, and made this body self-perpetuating, and authorized it to make contracts for the construction of the buildings, and to make requisitions on the common council for the expenses thereof, the citizens of Philadelphia having no vote or voice whatever as to the subject. This, of course, could only be defended upon the idea that the city hall was not municipal, but governmental, property, over which the state had supreme control. Between Pennsylvania at one extreme and Michigan at the other, the other states stand in a middle position of greater safety, even if greater doubt, as to the administration of the law.

### PROPERTY

28. Public property held by a municipality for the benefit of the general public may be controlled and administered by the state as supreme trustee for the public; but property actually acquired by a municipal corporation in the course of administration, and held for the benefit of the municipality, is not subject to the absolute control of the Legislature.

In the consideration of the right of the Legislature to control the property of a municipality, the dual nature of the corporation causes difficulties, not in stating the principle, but in its practical application. Contentions inevitably arise over the question, What is strictly municipal property, and what

<sup>92</sup> Perkins v. Slack, 86 Pa. 283.

is governmental property; or what property is held by the municipality for the benefit of the general public, and what for the local benefit? The adjudged cases do not point out any distinct line of separation for these two classes of property, and in the confusion of cases upon this subject it is not wise to attempt to formulate any definite rule of law whereby to distinguish them, other than that suggested in the text. In Michigan, where the right of local self-government is fully recognized and protected by constitutional provision, Judge Cooley says: "It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary vocations of life, by gift or by descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the law of the land."<sup>93</sup> It is hardly proper, in other states where home rule is not so highly favored, to speak of any municipal property as private property. It is, however, essentially trust property, the municipality being the trustee, and the people of the locality the cestuis que trustent of strictly municipal property.<sup>94</sup> Of this class of property Judge Dillon expresses the opinion: "That while the Legislature has full power of legitimate regulation and control, it cannot deprive them (that is, in essence, the people of the locality at whose expense it has been acquired, or for whose benefit it was granted) of such property. It is in effect fastened with a trust for the incorporated municipality as long as the Legislature suffers it to live, and for the benefit of the people of the locality if the corporate entity which represents their rights shall be dissolved."<sup>95</sup> In New

<sup>93</sup> City of Detroit v. Detroit & H. Plank Road Co., 43 Mich. 147, 5 N. W. 275.

<sup>94</sup> Nichol v. Mayor, etc., of Town of Nashville, 9 Humph. (Tenn.) 252; Penny v. Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858; Small v. Inhabitants of Danville, 51 Me. 359; Jones v. City of New Haven, 34 Conn. 1; Maximilian v. Mayor, etc., of City of New York, 62 N. Y. 160, 20 Am. Rep. 468; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375.

<sup>95</sup> 1 Dill. Mun. Corp. § 68a.

York it was decided that certain real estate held by the city in fee simple absolute under ancient grant, upon which at great expense the city had constructed reservoirs, could not by legislative action be converted into a public park without compensation to the city.<sup>96</sup> Upon the dissolution of a municipal corporation, so much of its assets as are not stamped with the strictly public character will be taken possession of and administered for the benefit of creditors of the corporation by a receiver appointed by the Legislature, or by the court of chancery.<sup>97</sup>

Where property is bought and held specially for local purposes, the local community have a special interest therein, as has also the creditor who has furnished money for its purchase; both are interested in its value and continued ownership by the corporation.<sup>98</sup> This may be illustrated in the mat-

<sup>96</sup> Webb v. Mayor, 64 How. Prac. (N. Y.) 10. See, also, Terrett v. Taylor, 9 Cranch (U. S.) 52, 3 L. Ed. 650; People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; 2 Kent, Comm. 257.

<sup>97</sup> 1 Dill. Mun. Corp. § 170.

<sup>98</sup> People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; Jones v. City of New Haven, 34 Conn. 1; Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Small v. Inhabitants of Danville, 51 Me. 359; Nichol v. Mayor, etc., of Town of Nashville, 9 Humph. (Tenn.) 252; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Howe v. City of New Orleans, 12 La. Ann. 481; People ex rel. Board of Park Com'r's of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; City of Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; Niles Water Works Co. v. City of Niles, 59 Mich. 311, 26 N. W. 525; Commonwealth v. City of Philadelphia, 132 Pa. 288, 19 Atl. 136; City of Philadelphia v. Fox, 64 Pa. 180; Safety Insulated Wire & Cable Co. v. City of Baltimore, 66 Fed. 140, 13 C. C. A. 375; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; City of Louisville v. Commonwealth, 1 Duv. (Ky.) 295, 85 Am. Dec. 624; STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4; Oliver v. City of Worcester, 102 Mass. 489, 3 Am. Rep. 485; In re Malone's Estate, 21 S.

ter of waterworks, gasworks, electric plants, and the like, which, though owned by the city, have a peculiarly private nature, and are protected by the state for the use of those interested when the corporation is dissolved.<sup>1</sup> Other items of property, such as streets, market places, public squares, and the like, represent the property held for public use.<sup>2</sup> The authority of the Legislature to control municipal property and affairs does not include the property and affairs which are of a private nature,<sup>2</sup> and all legislative acts controlling or dis-

C. 435; *United States v. Railroad Co.*, 17 Wall. (U. S.) 332, 21 L. Ed. 597.

<sup>1</sup> Committee of Union Tp. v. Rader, 41 N. J. Law, 617; Amy v. Selma, 77 Ala. 103; Rader v. Southeasterly Road District of Union Tp., 36 N. J. Law, 273; People v. Morris, 13 Wend. (N. Y.) 325; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Darlington v. Mayor, etc., of City of New York, 31 N. Y. 164, 88 Am. Dec. 248; Fish v. Branin, 23 N. J. Law, 484; President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 386; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. Ed. 490.

But see, contra, Coyle v. McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109, where it was held that a municipal corporation does not hold property for the purpose of furnishing its inhabitants with water, as a private corporation, so as to prevent the Legislature from modifying the management thereof at will. See, also, Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667.

<sup>1</sup> Elliott, Roads & S. § 656; *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 338, 24 Am. Rep. 773; *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 South. 590; *County Com'rs of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299. See, also, *People v. Kerr*, 27 N. Y. 188, where the court said, with reference to the holding of streets by the corporation, that it "is as directly under the power and control of the Legislature for any public purpose as any property held by the state or any public body or officers, and its application cannot be challenged by a corporation, which, in respect to such property at least, is a mere agent of the sovereign power of the people."

<sup>2</sup> *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248; *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455; *City of Louisville v. President, etc., of University of Louisville*, 15 B. Mon. (Ky.) 642; *Portland & W. V. R. Co. v. Port-*

posing of the property and valuable franchises of municipal corporations are subject to the limitations necessary for the protection of the vested and peculiar rights of the people and creditors of the municipality in its quasi private affairs.<sup>3</sup> By this term is not meant to include those kinds of property in a city which may be owned and controlled for the use of the citizens either by the city or by some private corporation or individual. Property of this kind, when owned and used by the city for the convenience of its citizens, and as a source of revenue for itself, has been generally held to be controlled and protected by the same rules of law as if it were owned by a private corporation, and therefore is not subject to discretionary legislative control.<sup>4</sup> So, also, the lands or other property which have been acquired by a municipal corporation by gift or purchase for local uses.<sup>5</sup>

land, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *People v. Kerr*, 27 N. Y. 188; *Mercer v. Pittsburgh*, Ft. W. & C. R. Co., 36 Pa. 99; *Mayor, etc., of City of New Orleans v. Hopkins*, 13 La. 326; *New Orleans, M. & C. R. Co. v. City of New Orleans*, 26 La. Ann. 517; *Councils of Reading v. Commonwealth*, 11 Pa. 196, 51 Am. Dec. 534; *Wagner v. City of Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

<sup>3</sup> *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; 1 Smith, Mun. Corp. § 1702. The Legislature of a state has no right to interfere with and control by compulsory legislation the action of municipal corporations with respect to property and contract rights of purely local concern. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605.

<sup>4</sup> *People v. Kerr*, 27 N. Y. 188; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *New Orleans, M. & C. R. Co. v. City of New Orleans*, 26 La. Ann. 517; *Trustees, etc., of the Town of Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1, 22 N. E. 387; *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Cummings v. City of St. Louis*, 90 Mo. 259, 2 S. W. 130; *Proprietors of Mt. Hope Cemetery v. City of Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515; *City of Wellington v. Wellington Township*, 46 Kan. 213, 26 Pac. 415; *Councils of Reading v. Commonwealth*, 11 Pa. 196, 51 Am. Dec. 534; *State ex rel. Attorney General v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Mercer v. Pittsburgh*, Ft. W. & C. R. Co., 36 Pa. 99.

<sup>5</sup> *Webb v. Mayor, etc. of City of New York*, 64 How. Prac. (N.

## FRANCHISES

### 29. Public franchises held by a municipal corporation under legislative grant may be altered or revoked at the legislative will.

The franchise to be a corporation, which is held to belong to the corporators of a private corporation, and to be protected by the contract clause of the federal Constitution, is obviously as to municipalities a matter of merely public concern, and therefore under the legislative control in all particulars and at all times, as we shall hereafter see in considering the subject of the charter.<sup>6</sup> All municipal franchises are subjects of legislative grant, and, whether granted to third persons or to the corporation itself, may be revoked before the grantee has performed the public service imposed as a condition of the grant.<sup>7</sup> For example, the right to construct waterworks, gasworks, or electric plants, and to supply the city and its citizens with these public utilities necessary for an urban population in modern times, may be granted either to the municipality or to a private corporation organized for that purpose. Before the work has been done to construct these public utilities, the state may repeal the law by which they were granted, and thus revoke the franchises;<sup>8</sup> but with regard to private corporations these

Y.) 10; *Terrett v. Taylor*, 9 Cranch (U. S.) 52, 3 L. Ed. 650; 2 Kent, Comm. 257. See cases cited in note 43.

<sup>6</sup> *Layton v. City of New Orleans*, 12 La. Ann. 515; *Girard v. Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *Smith v. Inge*, 80 Ala. 283; 1 Dill. Mun. Corp. §§ 63-68; *Elliott, Mun. Corp.* § 2.

<sup>7</sup> As indicative of the lack of power of a municipality to grant a franchise, in *Cain v. City of Wyoming*, 104 Ill. App. 538, it was held that a city ordinance granting the privilege of constructing and operating a system of waterworks is a mere license. A franchise must be granted by the Legislature; a municipal body cannot confer it.

<sup>8</sup> *Trustees of Schools v. Tatman*, 13 Ill. 28, 30; *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Hartford Bridge Co. v. Town of East Hartford*, 16 Conn. 149.

franchises, as soon as the works are completed, become contracts, protected by the rule in the Dartmouth College Case, and no law can be passed by the state to impair the obligations of this contract.<sup>9</sup> The same rule, it is believed, should apply in case these franchises are granted to the municipality and exercised by it.<sup>10</sup> But here arises a conflict between this contractual right to the franchises so granted and the undoubted power of the Legislature to dissolve the corporation, and the subject becomes one of complication and difficulty. Suffice it to say for the present that the legislative control of such franchises as supply these public utilities is not absolute and unlimited. It has been held with regard to certain franchises that the Legislature has unqualified right of revocation; for example, a public corporation has no property right in a ferry franchise acquired under a legislative grant,<sup>11</sup> nor in a wharf franchise to maintain wharves and charge wharfage.<sup>12</sup> Such powers are held by the United States Supreme Court to be "merely administrative, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration."<sup>13</sup>

### PUBLIC THOROUGHFARES

30. The Legislature has general control over all streets, canals, rivers, and bridges, and other public thoroughfares, and may compel the municipality to make such expenditures thereon for their improvement as it deems best for the public welfare.

<sup>9</sup> *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

<sup>10</sup> *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; *Benson v. Mayor, etc., of City of New York*, 10 Barb. (N. Y.) 223; *City of Cincinnati v. Cameron*, 33 Ohio St. 336.

<sup>11</sup> *Hartford Bridge Co. v. Town of East Hartford*, 16 Conn. 149; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511, 13 L. Ed. 518, 531.

<sup>12</sup> *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015.

<sup>13</sup> *Id.*

The state, as the sovereign agency of the people for the purposes of government, holds all public powers and utilities in trust for the public welfare.<sup>14</sup> Hence the Legislature as supreme trustee for the people has power of control over all streets, avenues, and alleys.<sup>15</sup> Within constitutional limitations it may determine when, where, and how streets or other public highways may be opened, graded, improved, and regulated,<sup>16</sup> and may vacate streets and close them to the public, subject, however, to the vested rights of abutting owners.<sup>17</sup>

As all public thoroughfares are matters of general, as distinguished from local, concern, the Legislature may prescribe what improvements thereon shall be made for the public convenience, and may require the corporation to pay the expense of particular improvements required by it.<sup>18</sup> The Legislature may use the compulsory power of taxation, or even compel the issuance of bonds by a municipality, for the purpose of raising money to pay for the construction and maintenance of a bridge or a canal, or wharves or levees in the city limits.<sup>19</sup>

<sup>14</sup> *Kreigh v. City of Chicago*, 86 Ill. 407.

<sup>15</sup> *People v. New York & H. R. Co.*, 45 Barb. (N. Y.) 73, 26 How. Prac. 44; *SIMON v. NORTHUP*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171, Cooley, Cas. Mun. Corp. 57; *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

<sup>16</sup> *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *Barrows v. City of Sycamore*, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. Rep. 400; *SIMON v. NORTHUP*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171, Cooley, Cas. Mun. Corp. 57; *Daley v. City of St. Paul*, 7 Minn. 390 (Gil. 311); *Baird v. Rice*, 63 Pa. 489.

<sup>17</sup> *Appeal of McGee*, 114 Pa. 470, 8 Atl. 237; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831.

<sup>18</sup> *People v. Kerr*, 27 N. Y. 188; *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Daley v. City of St. Paul*, 7 Minn. 390 (Gil. 311).

<sup>19</sup> *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *Guilder v. Town of Otsego*, 20 Minn. 74 (Gil. 59); *Thomas v. Leland*, 24 Wend. (N. Y.) 65.

And in Massachusetts it has been held that the Legislature may charge the cost of an authorized public improvement upon the municipal corporation chiefly benefited thereby.<sup>20</sup> In Maryland and some other states, so important is this duty to maintain streets and highways that it may be enforced by mandamus at the suit of a private person without showing special interest or injury.<sup>21</sup> The power of the Legislature over streets is so great that it may, so far as the public is concerned, determine to what use they may be put, even to the authorization of a nuisance in them;<sup>22</sup> and in Pennsylvania the power of the Legislature to authorize a turnpike gate to be established in a city street has been supported by judicial decision.<sup>23</sup> Street railways are operated in every city of the country. Usually the Legislature requires that the street railway companies shall obtain their franchise from the city;<sup>24</sup> but these franchises may be conferred by the Legislature directly, without regard to corporate authority.<sup>25</sup> In some states the concurrence of both Legislature and city is required.<sup>26</sup> The Legislature likewise possesses the power to locate streets, and may exercise it without municipal consent.<sup>27</sup>

<sup>20</sup> *Inhabitants of Norwich v. Hampshire County Com'rs*, 13 Pick. (Mass.) 60.

<sup>21</sup> *Pumphrey v. Mayor, etc., of Baltimore*, 47 Md. 145, 28 Am. Rep. 446.

<sup>22</sup> *State v. Luce*, 9 Houst. (Del.) 396, 32 Atl. 1076; *Bedell v. Long Island R. Co.*, 44 N. Y. 367, 4 Am. Rep. 688; *Cleaveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Pennsylvania R. Co. v. Lipincott*, 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; *State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5.

<sup>23</sup> *Stormfeltz v. Manor Turnpike Co.*, 13 Pa. 555.

<sup>24</sup> *State ex rel. Laclede Gaslight Co. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798.

<sup>25</sup> *People v. Kerr*, 27 N. Y. 188; *Dubach v. Hannibal & St. J. R. Co.*, 89 Mo. 483, 1 S. W. 86; *Savannah & T. R. Co. v. Mayor, etc., of City of Savannah*, 45 Ga. 602; *City of Milwaukee v. Milwaukee & B. R. Co.*, 7 Wis. 85; *City of Chicago v. Illinois Steel Co.*, 66 Ill. App. 561; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 95 Ky. 50, 23 S. W. 592, 44 Am. St. Rep. 203.

<sup>26</sup> 2 Dill. Mun. Corp. § 701a, note.

<sup>27</sup> *Lennon v. Mayor, etc., of City of New York*, 55 N. Y. 365; *Sinton v. Ashbury*, 41 Cal. 525.

This, like other municipal powers, may be delegated to the municipality.<sup>28</sup>

The doctrines of this chapter are believed to have the support of the preponderance of judicial decision in the United States, and to be consistent with the fundamental principles of our government.

<sup>28</sup> 2 Dill. Mun. Corp. §§ 680, 727; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336. See post, § 107.

## CHAPTER IV

### ALTERATION AND DISSOLUTION

31. In General.
32. Territorial Increase or Decrease.
33. Division of Municipal Territory.
34. Consolidation.
35. Operation and Effect of Annexation, Division, or Consolidation.
36. Repeal of Charter and Dissolution.
37. Reincorporation.

#### IN GENERAL

31. The Legislature has plenary powers, unless forbidden by constitutional provision—
  - (a) To change the boundaries of municipal corporations so as to enlarge or decrease their territory;
  - (b) To divide a municipal corporation into two or more separate municipalities;
  - (c) To unite two or more separate municipal corporations into a single one;
  - (d) To repeal the charter, and thereby dissolve the corporation.

The power of the Legislature to create and control municipal corporations naturally includes the power to alter the boundaries of such corporations at will, without the consent of the municipality or its inhabitants.<sup>1</sup> There is an apparent conflict of decisions on the question whether the discretion of

<sup>1</sup> Wade v. City of Richmond, 18 Grat. (59 Va.) 583; Slauson v. City of Racine, 13 Wis. 398; Toney v. City of Macon, 119 Ga. 83, 46 S. E. 80; Town of Cicero v. City of Chicago, 182 Ill. 301, 55 N. E. 351; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Carrithers v. City of Shelbyville, 126 Ky. 769, 104 S. W. 744, 17 L. R. A. (N. S.) 421; Lutterloh v. City of Fayetteville, 149 N. C. 65, 62 S. E. 758; Pittsburgh, C., C. & St. L. Ry. Co. v. City of Anderson, 176 Ind. 16, 95 N. E. 363; Allen v. Board of Trustees of City of Bakersfield, 157 Cal. 720, 109 Pac. 486.

the Legislature in this regard can be controlled by the courts.<sup>2</sup> That the courts should control the exercise of this power is certainly anomalous. In view of the fact, however, that the power of altering its boundaries may be and usually is delegated to the municipality,<sup>3</sup> it is probable that most of the cases are in reality instances of control by the courts of the exercise of delegated powers. This question is further discussed in the following section. As to the nature of the changes which may be made in the municipality, its territory may be increased or diminished, it may be divided into two or more municipalities, or it may be consolidated with another municipality. As a further corollary of the general principle of legislative control, a municipal corporation may be wholly reorganized as a new corporation, or it may be dissolved and its existence terminated.

#### TERRITORIAL INCREASE OR DECREASE

32. The boundaries of a municipal corporation may be enlarged by the annexation of territory, subject to the limitation that only adjacent or contiguous territory can be attached.

The power to change the boundary of a municipal corporation may also be exercised in diminishing its territory by a detachment or excision of a part thereof.

The general power of the Legislature to enlarge the boundaries of a municipality by annexing or authorizing the annexation of territory is upheld in numerous deci-

<sup>2</sup> *Town of Roswell v. Ezzard*, 128 Ga. 43, 57 S. E. 114; *State v. Waxahachie*, 81 Tex. 626, 17 S. W. 348; *Madry v. Cox*, 73 Tex. 538, 11 S. W. 541.

<sup>3</sup> *City of Burlington v. Leebrick*, 43 Iowa, 252; *Callen v. City of Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736; *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813.

sions.<sup>4</sup> While there is some conflict of decisions as to the right of the Legislature to delegate the power to annex territory to a municipality,<sup>5</sup> unquestionably the Legislature may by general laws provide for annexation and place the matter in the hands of the municipality, or some special board or tribunal, to determine when the conditions justifying annexation exist.<sup>6</sup> It is not generally regarded as a delegation of legislative power to leave the annexation of territory to the option of the municipality, or to provide for submission of the question to the vote of the people.<sup>7</sup> But, of course, without authority duly given a municipality cannot on its own authority extend its boundaries.<sup>8</sup>

The courts of the country have been inclined to restrict the

<sup>4</sup> City of Santa Rosa v. Coulter, 58 Cal. 537; People ex rel. Cuff v. City of Oakland, 123 Cal. 598, 56 Pac. 445; CITY OF DENVER v. COULEHAN, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751, Cooley, Cas. Mun. Corp. 61; Toney v. City of Macon, 119 Ga. 83, 46 S. E. 80; True v. Davis, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266; Paul v. Town of Walkerton, 150 Ind. 565, 50 N. E. 725; State v. Warner, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263; McCain v. City of Des Moines, 128 Iowa, 331, 103 N. W. 979; Attorney General ex rel. Battishill v. Township Board of Springwells Tp., 143 Mich. 523, 107 N. W. 87; Wade v. City of Richmond, 18 Grat. (59 Va.) 583; Powell v. City of Parkersburg, 28 W. Va. 698.

<sup>5</sup> The power is upheld in City of Burlington v. Leebrick, 43 Iowa, 252; Callen v. City of Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736; Huling v. Topeka, 44 Kan. 577, 24 Pac. 1110; City of Wahoo v. Dickinson, 23 Neb. 426, 36 N. W. 813; City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616. But see Forsyth v. City of Hammond, 71 Fed. 443, 18 C. C. A. 175; City of Galesburg v. Hawkinson, 75 Ill. 152.

<sup>6</sup> Foreman v. Town of Marianna, 43 Ark. 324; Mayor of City of Jeffersonville v. Weems, 5 Ind. 547; Strosser v. City of Ft. Wayne, 100 Ind. 443; McCain v. City of Des Moines, 128 Iowa, 331, 103 N. W. 979; City of Covington v. Southgate, 54 Ky. (15 B. Mon.) 491.

<sup>7</sup> People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205; Attorney General ex rel. Battishill v. Township Board of Springwells Tp., 143 Mich. 523, 107 N. W. 87; Little Rock v. North Little Rock, 72 Ark. 195, 79 S. W. 785.

<sup>8</sup> Strosser v. City of Ft. Wayne, 100 Ind. 443; Atchison & N. R. Co. v. Maquoketa, 12 Kan. 301; People ex rel. Kittredge v. Mabie, 142 N. Y. 343, 37 N. E. 115; Short v. Gouger (Tex. Civ. App.) 130 S. W. 267.

scope of the legislative power in enlarging corporations so as to observe the unity, territorial as well as legal, of a municipal corporation.<sup>9</sup> The decisions in regard to the power of annexing territory to an existing corporation have been made chiefly in states where the law permits existing municipal corporations to extend their own territory by the action of the corporation, and rarely when the Legislature itself has exercised its power for this purpose. The delegation of any legislative power is always of doubtful right; but, when the particular act to be performed is largely ministerial and exclusively legislative, the delegation of power has been sustained often by the courts.<sup>10</sup> Conceding the power of the legislative department to create municipal corporations, and to alter them according to its own judgment of public welfare, the courts have held this right must be exercised in accordance with the facts of nature and the truths of science. They have declared that a municipality is a single body, and that its territory must be included within a single boundary; that even the Legislature is subject to the mathematical verities, and cannot by legislative enactment destroy the standard formula, "One and one make two."<sup>11</sup> Accordingly it has been ruled that noncontiguous territory cannot be annexed to a municipality.<sup>12</sup>

<sup>9</sup> State v. City of Waxahachie, 81 Tex. 626, 17 S. W. 348.

<sup>10</sup> Kelly v. Meeks, 57 Mo. 396; Stilz v. City of Indianapolis, 55 Ind. 515; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Blanchard v. Bissell, 11 Ohio St. 96; Hurla v. Kansas City, 46 Kan. 738, 27 Pac. 143; Callen v. City of Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736.

<sup>11</sup> VESTAL v. LITTLE ROCK, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; Cooley, Cas. Mun. Corp. 67; Vogel v. Little Rock, 54 Ark. 335, 15 S. W. 836; Blanchard v. Bissell, 11 Ohio St. 96; CITY OF DENVER v. COULEHAN, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751; Cooley, Cas. Mun. Corp. 61; Chicago & N. W. Ry. Co. v. Town of Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840.

<sup>12</sup> City of Evansville v. Page, 23 Ind. 525; Smith v. Sherry, 50 Wis. 210, 6 N. W. 561; Blanchard v. Bissell, 11 Ohio St. 96; Truax v. Pool, 46 Iowa, 256; Town of Enterprise v. State, 29 Fla. 128, 10 South. 740; Woodruff v. Eureka Springs, 55 Ark. 618, 19 S. W. 15; Wild v. People, 227 Ill. 556, 81 N. E. 707; Little Rock v. Town of

The authority of the courts to declare that territory not contiguous to an existing municipal corporation cannot be annexed by legislative act is obvious, since it is not possible physically to annex noncontiguous tracts of land. But where the Legislature exercises its discretionary power to annex contiguous unsettled and unoccupied territory, farming or pasture lands, or even woodlands, to a municipal corporation, it is not easy to see how the courts can get jurisdiction to revise this legislative discretion, and declare the legislative act to be void.<sup>13</sup> That they should do so, however, in proper cases, where this power of annexation is exercised by the corporation itself under an express or implied delegation of authority therefor, is not in the least strange or presumptuous, since in such cases the courts do not admit that they are revising legislative discretion, but are restraining a manifestly improper exercise or an abuse of legislative power by a subsidiary body using the power for its own benefit.<sup>14</sup>

#### *What Territory may be Annexed*

The general rule is that the territory to be annexed to a municipality must be contiguous or adjacent.<sup>15</sup> By the term

North Little Rock, 72 Ark. 195, 79 S. W. 785; South Platte Land Co. v. Buffalo Co., 15 Neb. 605, 19 N. W. 711; McClay v. City of Lincoln, 32 Neb. 412, 49 N. W. 282; Town of Cicero v. City of Chicago, 182 Ill. 301, 55 N. E. 351; Clark v. City of Kansas City, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392; Miller v. City of Camden (N. J. Sup.) 44 Atl. 961.

<sup>13</sup> People v. Bennett, *supra*; City of Galesburg v. Hawkinson, 75 Ill. 152.

<sup>14</sup> In Kelly v. Meeks, 87 Mo. 396, it was held that an act conferring upon a city power to extends its limits was unconstitutional. See, also, Stilz v. City of Indianapolis, 55 Ind. 515; Taylor v. City of Ft. Wayne, 47 Ind. 274; People v. Carpenter, 24 N. Y. 86; People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 Pac. 311; Devore's Appeal, 56 Pa. 163; and cases in note 11.

<sup>15</sup> State v. City of Waxahachie, 81 Tex. 626, 17 S. W. 348; VEST-AL v. LITTLE ROCK, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; Cooley, *Cas. Mun. Corp.* 67; Vogel v. Little Rock, 55 Ark. 618, 19 S. W. 15; Blanchard v. Bissell, 11 Ohio St. 96; City of Evansville v. Page, 23 Ind. 525; Smith v. Sherry, 50 Wis. 210, 6 N. W. 561; Hurla v. Kansas City, 46 Kan. 738, 27 Pac. 143; In re Sadler (Appeal of

"contiguous" is meant such lands as touch the municipal boundaries, while "adjacent" may include those lying near to, but not actually touching, the existing boundary of the municipality.<sup>16</sup>

Accordingly it has been decided that a city comprising two square miles of territory cannot annex an area of ten square miles, including farms and unoccupied lands;<sup>17</sup> nor can two square miles of territory, containing two settlements of people, separated by unoccupied farming lands not connected by lines of buildings or other improvement, be annexed to a municipal corporation;<sup>18</sup> nor lands occupied by the owner exclusively as a florist and farmer, to which no streets, or municipal improvements extend, and which the lines of settlement have not reached.<sup>19</sup> It has also been held that an unoccupied tract of land cannot be added to the territory of a village merely for the purpose of increasing the tax list and village revenue,<sup>20</sup> but that when such lands are platted and held for

Brinton) 142 Pa. 511, 21 Atl. 978; In re Heidler, 122 Pa. 653, 16 Atl. 97; City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616; Union Pac. Ry. Co. v. City of Kansas City, 42 Kan. 497, 22 Pac. 633.

<sup>16</sup> Hurla v. Kansas City, 46 Kan. 738, 27 Pac. 143; City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616; City of East Dallas v. State, 73 Tex. 371, 11 S. W. 1030; In re Borough of Alliance, 7 North Co. R. (Pa.) 396.

Territory may be contiguous to the municipality, though it is separated from it by a river. City of Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937; Vogel v. City of Little Rock, 54 Ark. 335, 15 S. W. 836.

<sup>17</sup> State ex rel. Taylor v. Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

<sup>18</sup> In re Borough of Larksville, 7 Kulp (Pa.) 84. Two tracts which merely corner on each other, or two tracts with a strip of 50 feet wide included merely to connect them, are not contiguous. Wild v. People, 227 Ill. 556, 81 N. E. 707.

<sup>19</sup> VESTAL v. LITTLE ROCK, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778, Cooley, Cas. Mun. Corp. 67.

<sup>20</sup> Village of Hartington v. Luge, 33 Neb. 623, 50 N. W. 957. In this case the Nebraska Supreme Court decided against the annexation of all lots not subdivided, and the court said that "the principal benefit in this case would be to the village by adding to the taxable property therein, but this of itself is not sufficient." Where 75 or 80 per cent. of the land included in the petition for the incor-

sale for use as town lots, or held and sold as town property, they may be annexed to the corporation.<sup>21</sup> They may also be annexed when they are needed for any proper municipal purpose, such as sewer, gas, or water,<sup>22</sup> or to supply residence sites for citizens,<sup>23</sup> or when they furnish a present abode for a large number of persons, or are valuable for prospective town uses.<sup>24</sup>

It is no objection to the compulsory annexation of contiguous territory that it will be brought under increased taxation without the consent of the owner, in order to pay, not only current expenses of the municipality, but also pre-existing indebtedness.<sup>25</sup> It is presumed that the municipal benefits con-

poration of a town was agricultural and pastoral lands, the incorporation was invalid. *Judd v. State*, 25 Tex. Civ. App. 418, 62 S. W. 543.

<sup>21</sup> *Strosser v. Ft. Wayne*, 100 Ind. 443; *Taylor v. Ft. Wayne*, 47 Ind. 274; *VESTAL v. LITTLE ROCK*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Cooley*, Cas. Mun. Corp. 67; *Union Pac. Ry. Co. v. Kansas City*, 42 Kan. 497, 22 Pac. 633; *Town of Cicero v. Williamson*, 91 Ind. 541.

General laws authorizing councils of cities and trustees of towns, by resolution, without notice, to annex contiguous territory which has been platted into lots, are constitutional. *Paul v. Town of Walkerton*, 150 Ind. 565, 50 N. E. 725.

<sup>22</sup> See *Elliott*, Mun. Corp. § 51; *Langley v. City Council of Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

The general rule is that municipal corporations cannot exercise their powers beyond their own limits, but there are some exceptions; as, for example, to provide for the discharge of sewage. *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

<sup>23</sup> *Taylor v. Ft. Wayne*, 47 Ind. 274; *Collins v. City of New Albany*, 59 Ind. 396; *VESTAL v. LITTLE ROCK*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Cooley*, Cas. Mun. Corp. 67; *Tilford v. City of Olathe*, 44 Kan. 721, 25 Pac. 223; *City of Plattsburg v. Riley*, 42 Mo. App. 18.

<sup>24</sup> *Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13; *VESTAL v. LITTLE ROCK*, 54 Ark. 321, 15 S. W. 891, 11 L. R. A. 778; *Cooley*, Cas. Mun. Corp. 67. But see *Woodruff v. Eureka Springs*, 55 Ark. 618, 19 S. W. 15, where the court expresses doubt as to whether annexation could be justified by the city for the sole purpose of using the territory proposed to be annexed for the establishment and maintenance of waterworks upon it. See *Glover v. Terre Haute*, 129 Ind. 593, 29 N. E. 412.

<sup>25</sup> *Hollister v. City of Rochester*, 41 Misc. Rep. 559, 85 N. Y. Supp. 147.

ferred have been purchased with the funds represented by this indebtedness, and that they will compensate the newly annexed addition for the increase of taxation.<sup>26</sup> But this is not a question for the courts. It belongs to the Legislature to ascertain and determine what territory shall be annexed.<sup>27</sup>

*Diminution of Territory of Municipality.*

The same inherent authority of the legislative assembly by which it enlarges boundaries may also be exercised in diminishing municipal boundaries by excision of a part of the territory.<sup>28</sup> This, too, may be done without consulting the mu-

<sup>26</sup> Lake Erie & W. R. Co. v. Alexandria, 153 Ind. 521, 55 N. E. 435. An act providing that certain territory annexed to a city shall not receive the benefit of police, fire, and light protection for 10 years is invalid for the reason that all parts of a city are entitled to the same advantages. Jones v. City of Memphis, 101 Tenn. 188, 47 S. W. 138. See Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011.

<sup>27</sup> Girard v. Philadelphia, 7 Wall. 1, 19 L. Ed. 53; Edmunds v. Gookins, 20 Ind. 477; Morford v. Unger, 8 Iowa, 82; Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 59; Wade v. City of Richmond, 18 Grat. (59 Va.) 583; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330; City of St. Louis v. Allen, 13 Mo. 400; Norris v. Mayor, 1 Swan (Tenn.) 164; Chandler v. City of Boston, 112 Mass. 200; Layton v. City of New Orleans, 12 La. Ann. 515; Smith v. McCarthy, 56 Pa. 359.

In Lake Erie & W. R. Co. v. Alexandria, 153 Ind. 521, 55 N. E. 435, an extension of the city limits so as to embrace a tract across which a railroad ran, on which there were standing cars infested with tramps, and the extension was made for the purpose of affording police protection to the portion, was held not unreasonable.

An extension of the limits of a city is not unreasonable when the territory annexed thereby is nearly all improved, and necessary for drainage and police purposes. City of Kansas City v. Stegmiller, 151 Mo. 189, 52 S. W. 723; Parker v. Zeisler, 73 Mo. App. 537; Village of Syracuse v. Mapes, 55 Neb. 738, 76 N. W. 458.

<sup>28</sup> MT. PLEASANT v. BECKWITH, 100 U. S. 514, 25 L. Ed. 699, Cooley, Cas. Mun. Corp. 74; Girard v. Philadelphia, 7 Wall. 1, 19 L. Ed. 53; Inhabitants of North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530; Johnson v. Incorporated Town of Forest City, 129 Iowa, 51, 105 N. W. 353; Miller v. City of Pineville, 121 Ky. 211, 89 S. W. 261; Meek v. State, 172 Ind. 654, 88 N. E. 299, 89 N. E. 307; Brenke v. Borough of Belle Plaine, 105 Minn. 84, 117 N. W. 157; True v. Davis, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266; Daly v. Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; Morgan v. Beloit, 7

unicipality, or that portion of its citizens thus summarily deprived of municipal privileges, unless forbidden by constitutional limitations. In short, this power of increase and diminution of municipal territory is plenary, inherent, and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts.<sup>29</sup>

### DIVISION OF MUNICIPAL TERRITORY

33. The Legislature may, without the consent of the people of a municipality, divide the same into two separate and distinct municipal corporations.

This power has been rarely exercised, as the tendency of urban population is rather to unite than separate into distinct municipalities, and this tendency is usually recognized and respected by legislative bodies. That the power exists, however, is well settled.<sup>30</sup> It is but a part of that general authority which the Legislature possesses over all municipal corporations as agencies of the government.

### CONSOLIDATION

34. It is competent for the Legislature, unless forbidden by the Constitution, to unite two or more distinct municipalities having contiguous territory into a single municipal corporation, without the consent of those corporations or the people thereof.

Wall. 613, 19 L. Ed. 203; Thompson v. Abbott, 61 Mo. 176; Cooley, Const. Lim. (6th Ed.) p. 228, and cases cited in note 2. See City of Indianapolis v. Ritzinger, 24 Ind. App. 65, 56 N. E. 141; Christ v. Webster City, 105 Iowa, 119, 74 N. W. 743, as to discretionary power.

<sup>29</sup> Williams v. Nashville, 89 Tenn. 487, 15 S. W. 364. See Cooley, Const. Lim. (6th Ed.) p. 228, note 1, and cases therein cited. Also State ex rel. Board of Com'rs of Polk County v. Demann, 83 Minn. 331, 86 N. W. 352; City of Guthrie v. Wylie, 6 Okl. 61, 55 Pac. 103.

<sup>30</sup> Hartford Bridge Co. v. Town of East Hartford, 16 Conn. 149;

The consolidation of two separate corporations into a single one is but another illustration of the inherent and plenary power possessed by the Legislature to create, control, and dissolve all municipal corporations.<sup>81</sup> Since the Legislature might by one act dissolve two existing contiguous corporations, and by another act create another municipality comprising the same territory, in the exercise of its conceded powers it may, of course, effect the same result by a single act, without circumlocution.<sup>82</sup> If the Legislature shall so choose to enact, one of these corporations may be merged into the other,<sup>83</sup> or both may be consolidated into a new and distinct corporation.<sup>84</sup> It is usual to submit this question of consolidation by legislative enactment to a vote of the people of the several corporations thus to be united;<sup>85</sup> but, unless the Constitution so requires, it is competent for the Legislature to make a consolidation without consulting the wishes of the people.<sup>86</sup>

*Washburn Waterworks Co. v. City of Washburn*, 129 Wis. 73, 108 N. W. 194.

<sup>81</sup> *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699; *Cooley*, Cas. Mun. Corp. 74; *Morgan v. Beloit*, 7 Wall. 613, 19 L. Ed. 203; *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53; *True v. Davis*, 133 Ill. 522, 22 N. E. 410, 6 L. R. A. 266; *Daly v. Morgan*, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; *Thompson v. Abbott*, 61 Mo. 176.

<sup>82</sup> *Cooley*, Const. Lim. (6th Ed.) 228, note. Under Code Ala. 1907, § 1126, a municipality cannot be consolidated with another where territory belonging to neither intervenes. *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 South. 847. Under Laws Kan. 1886, c. 63, § 1, providing for the consolidation of cities lying adjacent to each other "and not more than three-fourths of one mile apart," the consolidation of three cities was not illegal because one was not contiguous to the other two, the distance separating them being less than three-fourths of a mile. *State v. City of Kansas City*, 50 Kan. 508, 31 Pac. 1100.

<sup>83</sup> *Adams v. City of Minneapolis*, 20 Minn. 484 (Gil. 438).

<sup>84</sup> *Tied. Mun. Corp.* § 58.

<sup>85</sup> *Village of North Springfield v. City of Springfield*, 140 Ill. 165, 29 N. E. 849; *Warren v. City of Charlestown*, 68 Mass. (2 Gray) 84; *State ex rel. Cole v. City of New Whatcom*, 3 Wash. 7, 27 Pac. 1020. And see cases cited in note 26.

<sup>86</sup> *City of New Orleans v. Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; *State v. City of Cincinnati*, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; *State v. Kolsem*, 130 Ind. 434, 29 N.

The act of consolidation in such cases is said to be an official and peremptory expression of the Legislature that such consolidation will promote the public welfare, and from this enactment there is no appeal.<sup>37</sup>

### OPERATION AND EFFECT OF ANNEXATION, DIVISION, OR CONSOLIDATION

35. On the alteration of the boundaries of a municipal corporation by annexation, division, or consolidation, the rights, powers, and liabilities of the original corporation are not affected, except in so far as they may be changed by the legislative act by which the alteration is effected.

When the boundaries of a municipal corporation have been altered by annexation, the annexed territory comes under the power, control, and jurisdiction of the municipality for all purposes.<sup>38</sup> The proceeding by which annexation was effected cannot be collaterally attacked.<sup>39</sup> If the whole territory of one municipality is annexed to another, the annexed municipality is destroyed.<sup>40</sup> And when existing corporations are consolidated and a new corporation thereby created, the new corpo-

E. 595, 14 L. R. A. 566; Essex Public Road Board v. Skinkle, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446; Madry v. Cox, 73 Tex. 538, 11 S. W. 541; Smith v. People, 154 Ill. 58, 39 N. E. 319; State ex rel. Fremont, E. & M. V. R. Co. v. Babcock, 25 Neb. 709, 41 N. W. 654; City of Quincy v. O'Brien, 24 Ill. App. 591; In re Strand (Cal.) 21 Pac. 654; In re Canal St., 18 R. I. 129, 25 Atl. 975; City of Richmond v. Richmond & D. R. Co., 21 Grat. (62 Va.) 604; Common Council of City of Muskegon v. Gow, 94 Mich. 453, 54 N. W. 170; Commonwealth v. Macferron, 152 Pa. 244, 25 Atl. 556, 19 L. R. A. 568.

<sup>37</sup> Smith, Mun. Corp. § 407.

<sup>38</sup> Trustees of Schools v. Board of School Inspectors of City of Peoria, 115 Ill. App. 479; Ladd v. City of Portland, 32 Or. 271, 51 Pac. 654, 67 Am. St. Rep. 526.

<sup>39</sup> Hatch v. Consumers' Co., 17 Idaho, 204, 104 Pac. 670; Pavey v. Braddock, 170 Ind. 178, 84 N. E. 5; Powell v. City of Scranton, 227 Pa. 604, 76 Atl. 505; Gardner v. Benn, 81 Kan. 442, 105 Pac. 435.

<sup>40</sup> Stroud v. Stevens Point, 37 Wis. 367; Schriber v. Town of Langdale, 66 Wis. 616, 29 N. W. 547.

ration takes the place of the old corporation, which thereupon ceases to exist, and it can no longer exercise any corporate power, unless its corporate existence is continued for some purpose.<sup>41</sup> In the case of detachment of territory, so much of the territory as is detached goes back under state control.<sup>42</sup>

#### *Adjustment of Rights and Liabilities*

On the annexation of territory to a municipality, the liabilities of the original corporation are chargeable on the annexed territory,<sup>43</sup> which becomes liable for the payment of the pre-existing debts.<sup>44</sup> The imposition of these burdens on the annexed territory is supported by the equitable consideration that values have been increased and that the newly incorporated inhabitants acquire an interest in the public property purchased by previous bond issues and taxation.<sup>45</sup>

Where a municipality is divided the Legislature may apportion the burden of indebtedness between the two and determine which portion shall be borne by each, and may at the same time provide for a division of the property of the original municipality between the two parts thereof.<sup>46</sup> The

<sup>41</sup> Bloomfield Tp. v. Borough of Glen Ridge, 54 N. J. Eq. 276, 33 Atl. 925.

<sup>42</sup> People v. Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305. And see Deason v. Dixon, 54 Miss. 585, holding that the power of a city to sell for delinquent taxes land which was within the boundaries when the taxes fell due, but which by sale day has been detached, is lost if no provision is made saving the rights of the city.

<sup>43</sup> Cash v. Town of Douglasville, 94 Ga. 557, 20 S. E. 438; Smith v. City of Saginaw, 81 Mich. 123, 45 N. W. 964; Toney v. City of Macon, 119 Ga. 83, 46 S. E. 80; White v. City of Atlanta, 134 Ga. 532, 68 S. E. 103; Chalstran v. Board of Education of Township High School Dist. No. 13, 244 Ill. 470, 91 N. E. 712.

<sup>44</sup> Blanchard v. Bissell, 11 Ohio St. 96; STATE v. CITY OF CINCINNATI, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737, Cooley, Cas. Mun. Corp. 71; Madry v. Cox, 73 Tex. 538, 11 S. W. 541; Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011; White v. City of Atlanta, 134 Ga. 532, 68 S. E. 103. And see Gottschalk v. Becher, 32 Neb. 653, 49 N. W. 715.

<sup>45</sup> Toney v. City of Macon, 119 Ga. 83, 46 S. E. 80.

<sup>46</sup> Town of Sanbornton v. Town of Tilton, 53 N. H. 438; Town of

power to divide municipalities is strictly legislative, and the power to prescribe the rules by which the property and liabilities of the old corporation shall be divided being incident to the power to divide the territory is also strictly legislative.<sup>47</sup> No general rule can be laid down by which an equal and just apportionment can be made, but the apportionment must be founded on the circumstances of each particular case, and statutory provisions making such apportionment if not in violation of any constitutional right, are in all respects final.<sup>48</sup> In the absence of any apportionment by the Legislature, the old corporation, not being abolished, is liable for all the debts, and retains all the property,<sup>49</sup> including property which by the change of boundaries falls within the new corporation.<sup>50</sup>

When two municipalities are consolidated the new corpora-

MILWAUKEE v. CITY OF MILWAUKEE, 12 Wis. 93; JOHNSON v. CITY OF SAN DIEGO, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178, Cooley, Cas. Mun. Corp. 83; Londonderry v. Derry, 8 N. H. 320; Inhabitants of Orvil Tp. v. Borough of Woodcliff, 61 N. J. Law, 107, 38 Atl. 685; Hartford Bridge Co. v. Town of East Hartford, 16 Conn. 149; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; State ex rel. Board of Com'rs of Polk County v. Demann, 83 Minn. 331, 86 N. W. 352; Town of Humboldt v. City of Barnesville, 83 Minn. 219, 86 N. W. 87; RUMSEY v. TOWN OF SAUK CENTRE, 59 Minn. 316, 61 N. W. 330, Cooley, Cas. Mun. Corp. 33; Hurt v. Hamilton, 25 Kan. 82.

<sup>47</sup> State ex rel. Board of Com'rs of Polk County v. Demann, 83 Minn. 331, 86 N. W. 352; Bristol v. Town of New Chester, 3 N. H. 524.

<sup>48</sup> State ex rel. Board of Com'rs of Polk County v. Demann, 83 Minn. 331, 86 N. W. 352.

<sup>49</sup> Inhabitants of Bloomfield Tp. v. Borough of Glen Ridge, 55 N. J. Eq. 505, 37 Atl. 63; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502; Inhabitants of Frankfort v. Inhabitants of Winterport, 54 Me. 250; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93; Brewis v. City of Duluth, 13 Fed. 334; State ex rel. Minnesota Ry. Const. Co. v. Lake City, 25 Minn. 404. But in the case of common lands each municipality takes in the division such portion thereof as lies within its limits. Town of North Hempstead v. Town of Hempstead, Hopk. Ch. (N. Y.) 288; City of Lynn v. Inhabitants of Nahant, 113 Mass. 433. And see Prescott v. Town of Lennox, 100 Tenn. 591, 47 S. W. 181.

<sup>50</sup> City of Winona v. School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687.

tion ordinarily succeeds to all the rights, property and liabilities of the old corporations.<sup>51</sup> But as in the case of division of territory it is competent for the Legislature in case of consolidation to provide for the disposition of the municipal funds in the several corporate treasuries, or past due at the date of the consolidation;<sup>52</sup> and if it sees fit it may charge the indebtedness of each municipality to the property within its limits.<sup>53</sup>

### *Continuing Operation of Ordinances*

Where territory is annexed to the municipality, it becomes at once, without express legislative or municipal action, subject to the laws and ordinances by which the municipality is governed.<sup>54</sup> When there has been consolidation, until the common council of the consolidated city shall enact a code of ordinances for the government of the new municipality, the ordinances of the two former cities will be and remain in force within the territory of the old cities, respectively.<sup>55</sup>

<sup>51</sup> MT. PLEASANT v. BECKWITH, 100 U. S. 514, 25 L. Ed. 699; Cooley, Cas. Mun. Corp. 74; Inhabitants of North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530; Winters v. George, 21 Or. 251, 27 Pac. 1041; Town of Humboldt v. City of Barnesville, 83, Minn. 219, 86 N. W. 87; Thompson v. Abbott, 61 Mo. 176; Smith v. City of Saginaw, 81 Mich. 123, 45 N. W. 964; Stone v. Charlestown, 114 Mass. 214; Dousman v. Milwaukee, 1 Pin. (Wis.) 81; Watson v. Pamlico County Com'rs, 82 N. C. 17; De Mattos v. New Whatcom, 4 Wash. 127, 20 Pac. 933.

<sup>52</sup> Burlington Sav. Bank v. City of Clinton (C. C.) 106 Fed. 269; Lake Charles Ice, Light & Waterworks Co. v. Lake Charles City, 106 La. 65, 30 South. 289.

<sup>53</sup> De Mattos v. City of New Whatcom, 4 Wash. 127, 29 Pac. 933; Pennsylvania Co. v. City of Pittsburgh, 226 Pa. 322, 75 Atl. 421, 134 Am. St. Rep. 1063.

<sup>54</sup> People v. Detroit United Ry., 162 Mich. 460, 127 N. W. 748, 139 Am. St. Rep. 582; Deneen v. Houghton Co. St. Ry. Co., 150 Mich. 235, 113 N. W. 1126, 13 Ann. Cas. 134; St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121.

<sup>55</sup> Camp v. Minneapolis, 33 Minn. 461, 23 N. W. 845; Village of North Springfield v. Springfield, 140 Ill. 165, 29 N. E. 849; Vogel v. Little Rock, 55 Ark. 609, 19 S. W. 13; Smith v. People ex rel. Malone, 154 Ill. 58, 39 N. E. 319.

## REPEAL OF CHARTER AND DISSOLUTION

**36. The Legislature may, at its pleasure, repeal the charter of a municipal corporation, and thereby terminate its existence.**

The power of the Legislature to dissolve a municipal corporation and thus terminate its existence is recognized in numerous decisions.<sup>56</sup> Here, again, we have another illustration of the sole authority of the Legislature in matters of municipal corporations. It can create, regulate, and destroy, and there is no other body or department of government which possesses this power.<sup>57</sup>

The government possesses this power in England, but the king does not.<sup>58</sup> His prerogative is to create. He cannot destroy. Parliament alone is omnipotent.<sup>59</sup> In England municipi-

<sup>56</sup> *Jones v. Pensacola*, Fed. Cas. No. 7,488; *State v. Jennings*, 27 Ark. 419; *Town of Montpelier v. Town of East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Burk v. State*, 73 Tenn. 349; *State ex rel. Douglas v. Village of Reads*, 76 Minn. 69, 78 N. W. 883.

<sup>57</sup> *Hill v. Anderson*, 122 Ky. 87, 90 S. W. 1071. "All our thoughts and notions of civil government are inseparably associated with cities, counties, and towns. They are permanent elements in the frame of government. They are institutions of the state, durable, and indestructible by any power less than that which gave being to the organic law. They are, however, subject to control and regulation by the Legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their members, separate them into parts, and annex some of the parts to others." *People v. Draper*, 15 N. Y. 561, per Brown, J. But the Legislature may by general law provide for disincorporation of municipalities. See *Mintzer v. Schilling*, 117 Cal. 361, 49 Pac. 209; *State ex rel. Alsop v. Husband*, 26 Ind. 308.

<sup>58</sup> 1 Beach, *Pub. Corp.* § 25; 2 Kent, *Comm.* 305; Coke, *Litt.* 176, note; *Rex v. Amory*, 2 Term R. 515. See, also, *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *City of St. Louis v. Allen*, 13 Mo. 400.

<sup>59</sup> *Glover, Mun. Corp.* 24; 1 Dill. *Mun. Corp.* § 33; 1 Kyd, *Corp.* 61; Willc. *Mun. Corp.* 63, 64; Coke, *Litt.* 176; *Rex v. Amory*, 2 Term R. 515; 2 Kent, *Comm.* 305; *Regents of University v. Williams*, 9 Gill & J. 365, 409, 31 Am. Dec. 72.

pal corporations might also be dissolved by the loss of an integral part thereof,<sup>60</sup> or by the surrender of franchises,<sup>61</sup> or by a forfeiture of its charter judicially decreed in proceedings by scire facias or quo warranto.<sup>62</sup> These last two methods certainly are not recognized in America.<sup>63</sup> The Legislature having ordained that there shall be a corporation, the citizens thereof cannot nullify that edict by a surrender of the franchise; nor by neglect to exercise the powers and privileges conferred by the charter can they subject the corporation to forfeiture of its franchise.<sup>64</sup> The loss of an integral part of a municipal corporation would practically destroy it, as if the people should all remove from the territory,<sup>65</sup> or it should be swallowed by an earthquake or volcanic eruption.

<sup>60</sup> *Rex v. Morris*, 3 East, 215; *Rex v. Stewart*, 4 East, 17; *Rex v. Pasmore*, 3 Term R. 241; *Regina v. Bewdley*, 1 P. Wms. 207; *Banbury Case*, 10 Mod. 346; *Rex v. Tregony*, 8 Mod. 111.

<sup>61</sup> *Rex v. Osbourne*, 4 East, 326; *Rex v. Miller*, 6 Term R. 268; *Howard's Case*, Hut. 87; *Grant, Corp.* 306.

<sup>62</sup> *Rex v. Grosvenor*, 7 Mod. 199; *Smith's Case*, 4 Mod. 55; *Rex v. Saunders*, 3 East, 119; *Rex v. Kent*, 13 East, 220; *Attorney General v. Shrewsbury*, 6 Beav. 220.

<sup>63</sup> *State v. Waggoner*, 88 Tenn. 290, 12 S. W. 721; *Luehrman v. Taxing Dist. of Shelby*, 2 Lea (Tenn.) 425; *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364.

<sup>64</sup> *Welch v. Ste. Genevieve*, Fed. Cas. No. 17,872; *Butler v. Walker*, 98 Ala. 358, 13 South. 261, 39 Am. St. Rep. 61; *Hill v. Anderson*, 122 Ky. 87, 90 S. W. 1071; *Cain v. Brown*, 111 Mich. 657, 70 N. W. 337; *State ex rel. Hoya v. Dunson*, 71 Tex. 65, 9 S. W. 103; *Buford v. State*, 72 Tex. 182, 10 S. W. 401; *Morris v. State ex rel. Guessett*, 65 Tex. 53. In the last-named case the court said: "It is extremely doubtful whether a municipal corporation can, by a mere disclaimer, surrender a franchise in which not only the corporation, but a large portion of the state's population residing within the city's limits, as well as of the commercial world, are interested." In *Hambleton v. Dexter*, 89 Mo. 188, 1 S. W. 234, it was held that franchises granted to municipal corporations cannot be surrendered by them. But see *Cincinnati, N. O. & T. P. Ry. Co. v. Baughman*, 116 Ky. 479, 76 S. W. 351, holding that a municipal charter was forfeited by non-user for a period of 17 years.

<sup>65</sup> *Tied. Mun. Corp.* § 38.

*Dissolution—Form*

Historically, however, and legally too, the only form of dissolution known to American municipalities is legislative.<sup>66</sup> The motive, manner, time, or form of the enactment is not material. The legislative motive cannot be questioned judicially.<sup>67</sup> The age or youth of the corporation will not protect it. The form of the act of repeal is immaterial, if it comply with the constitutional requirement.<sup>68</sup> It may be special or general, as legislative wisdom shall decide. Whenever and however, and from whatever motive or purpose, the Legislature shall repeal the charter of a municipal corporation, its life is ended.<sup>69</sup> The limitations upon this legislative power,

<sup>66</sup> Luehrman v. Taxing Dist. of Shelby, 2 Lea (Tenn.) 425; Williams v. Nashville, 89 Tenn. 487, 15 S. W. 364; State v. Wilson, 12 Lea (Tenn.) 246; State v. Waggoner, 88 Tenn. 290, 12 S. W. 721. In People ex rel. Atty. Gen. v. Hill, 7 Cal. 97, the court said: "And as a city may, by legislative enactment, spring from the body of the county, being the first subdivision of the territory and political power of the state, there is no reason in law why it may not be resolved back to its original elements, or why the power that has called this political being into existence may not again destroy it. There is no limitation on the power of the Legislature in this respect, and economy and convenience may often require that an act incorporating a city should be repealed, and the inhabitants thereof placed in their original situation." See, also, State v. Hamilton, 40 Kan. 323, 19 Pac. 723; State v. Osborn, 36 Kan. 530, 13 Pac. 850; State ex rel. Hunt v. Meadows, 1 Kan. 90; Duncombe v. Prindle, 12 Iowa, 1.

<sup>67</sup> "Restraints on the legislative power of control must be found in the Constitution of the state, or they must rest alone in the legislative discretion." Cooley, Const. Lim. (6th Ed.) p. 229.

"Where a corporation is the mere creature of legislative will, established for the general good, and endowed by the state alone, the Legislature may, at pleasure, modify the law by which it was created. For in that case there would be but one party affected—the government itself—and therefore not a contract within the meaning of the Constitution. \* \* \*" Montpelier Academy Trustees v. George, 14 La. 406, 33 Am. Dec. 585.

If the legislative action in such cases of repeal operates injuriously to the municipalities or to their inhabitants, the remedy is not with the courts. They have no power to interfere. City of St. Louis v. Allen, 13 Mo. 400.

<sup>68</sup> As to the power to repeal the charter and the method of repeal, see post, § 44.

<sup>69</sup> Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Rees v. Wa-

the exercise of which may prove drastic and destructive of the interests of individuals and communities unless directed by prudence and caution, are of two kinds: (a) Positive inhibitions expressed in the Constitution; and (b) property rights vested or protected by constitutional guaranties which would be destroyed or impaired by such legislation.<sup>70</sup> A legislative act repealing a municipal charter, when forbidden by the Constitution, would, of course, be void, and would not effect or authorize a dissolution of the corporation; but the interests of the people of the municipality or of its creditors in its quasi private property would not prevent a repeal of the charter, and the consequent dissolution of the corporation. Its estate may then be administered, and its assets equitably applied and distributed.<sup>71</sup> Usually the means and method of this administration are provided for in the statute which enacts the dissolution of the corporation. The municipal corporation, being dual in its nature, necessarily has powers, privileges, and property of a purely local or private character, not subject to the unlimited legislative power, but exempt therefrom in some

tertown, 19 Wall. 107, 22 L. Ed. 72; Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946; Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223; Amy v. Selma, 77 Ala. 103; Luehrman v. Taxing Dist. of Shelby, 2 Lea (Tenn.) 425; City of Memphis v. Water Co., 5 Heisk. (Tenn.) 495; Lynch v. Lafland, 4 Cold. (Tenn.) 96. In the case of Luehrman v. Taxing Dist., supra, Cooper, J., said: "Being created as instrumentalities or arms of the government, they cannot be continued in that capacity whenever the public exigency, of which the Legislature alone is judge, demands that they should cease to act." See, also, People v. Morris, 13 Wend. (N. Y.) 325, 331; PEOPLE v. HURLBUT ex rel. LE ROY, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36. The express repeal of an existing charter does not revive an original charter, but the municipality ceases to exist as soon as the repeal takes effect. State ex rel. Douglas v. Village of Reads, 76 Minn. 69, 78 N. W. 883.

<sup>70</sup> Morris v. State ex rel. Gussett, 62 Tex. 728; Board of Councilmen of City of Frankfort v. Mason, 100 Ky. 48, 37 S. W. 290.

<sup>71</sup> Luehrman v. Taxing Dist. of Shelby, 2 Lea (Tenn.) 425; City of Cincinnati v. Cameron, 33 Ohio St. 336; PEPIN TP. v. SAGE, 129 Fed. 657, 64 C. C. A. 169, Cooley, Cas. Mun. Corp. 89; Chalstran v. Board of Education of Township High School Dist. No. 13, 244 Ill. 470, 91 N. E. 712; Ellerman v. McMains, 30 La. Ann. 190, 31 Am. Rep. 218.

states by a provision made for the protection of the community, in others by one made for the protection of creditors whose rights are always and everywhere protected by the contract clause of the federal Constitution, and the decision in the Dartmouth College Case applying and enforcing the same.<sup>72</sup> The citizens and creditors of the corporation, having these vested rights in certain property, franchises, and powers of the corporation, may protect and assert them through recognized remedies in the courts of law and equity, state or federal. If creditors have liens upon any of the municipal property, they may pursue their remedy in the courts after dissolution of the municipality as well as before. If the Legislature fails to provide for them, the courts of justice are open to afford them remedy and relief. The act of the Legislature effects the dissolution of the corporation. The pursuit of these remedies by the citizens and creditors is simply the administration of the estate of the deceased.<sup>73</sup>

### REINCORPORATION

37. The Legislature may, in the exercise of its general powers over municipal corporations, reorganize or reincorporate a municipality, or may provide by statute for the corporation to surrender its charter and reorganize under a new charter.

A mode of changing the constitution of a municipality, differing from either amendment or repeal of the charter, exists in many, if not all, the states in the form of provisions per-

<sup>72</sup> 1 Dill. Mun. Corp. §§ 66-69.

<sup>73</sup> The measure of this relief is not full or certain on account of the public nature of the corporation, the legislative control, and the sovereignty of the state. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *Port of Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Amy v. Selma*, 77 Ala. 103; *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699, Cooley, Cas. Mun. Corp. 74; *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946.

mitting a municipal corporation, either with or without a formal surrender of its charter, to reincorporate or adopt a new charter and reorganize under it.<sup>74</sup> The two elements of territory and population remaining substantially the same, a new charter is introduced, under which occurs a reorganization of the corporation, thus in law creating a new body, which is substantially the same as the old.<sup>75</sup> This two-fold aspect of the new municipality gives rise to certain questions of relation and obligation which have caused some difficulty. As the charter is the essential of municipal existence, the law generally treats the body established under the new charter as a separate municipality;<sup>76</sup> but as the same community continues to exercise and enjoy municipal privileges, franchises, and property under the new as under the old organization, the two bodies should, in equity, be treated as identical, or at least the new should be regarded as the successor of the old.<sup>77</sup> Under the automatic provisions of the laws of some of the states, whereby municipalities may frame their own charters, the identity of the corporation is preserved in both law and equity; the new charter being in effect an amendment to the old. Legislative authority is, of course, essential to enable a municipality to adopt a new charter or to reincorporate.<sup>78</sup> Statutes some-

<sup>74</sup> *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Port of Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Amy v. Selma*, 77 Ala. 103; *Brennan v. City of Weatherford*, 53 Tex. 330, 37 Am. Rep. 758; *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *Wright v. Overstreet*, 122 Ga. 633, 50 S. E. 487; *Blanchard v. Hartwell*, 131 Cal. 263, 63 Pac. 349; *Somo Lumber Co. v. Lincoln County*, 110 Wis. 286, 85 N. W. 1023.

<sup>75</sup> *BROADFOOT v. CITY OF FAYETTEVILLE*, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610, *Cooley, Cas. Mun. Corp.* 93; *Washburn Waterworks Co. v. City of Washburn*, 129 Wis. 73, 108 N. W. 194.

<sup>76</sup> *City of Jefferson v. Edwards*, 37 Mo. App. 617.

<sup>77</sup> *Amy v. Selma*, 77 Ala. 103; *BROADFOOT v. CITY OF FAYETTEVILLE*, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610, *Coolley, Cas. Mun. Corp.* 93; *Washburn Waterworks Co. v. Washburn*, 129 Wis. 73, 108 N. W. 194.

<sup>78</sup> *State ex rel. Hoya v. Dunson*, 71 Tex. 65, 9 S. W. 103. See, also, *People v. Bancroft*, 2 Idaho, 1077, 29 Pac. 112.

times provide, also, for reincorporation or reorganization of municipalities defectively incorporated, or which have attempted to incorporate under void acts.<sup>79</sup>

### *Effect of Reincorporation*

On the reincorporation of an existing municipality, there being no substantial change in territory or people, the new corporation may be regarded as identical with, or as the successor of, the old corporation, and in either case it succeeds to all the rights, property, and obligations of the original municipality.<sup>80</sup> When the inhabitants and territory remain practically the same, it will be presumed that the Legislature, in reorganizing the municipality, intended the continued existence of the same corporation; and in the absence of an express provision to the contrary, the liabilities and property rights of the original corporation attach to the reorganized corporation.<sup>81</sup>

On reincorporation, the ordinances of the old municipality remain in full force,<sup>82</sup> provided they are authorized by the new charter. Only such ordinances as are inconsistent with the new charter become invalid.<sup>83</sup>

<sup>79</sup> White v. City of Quanah (Tex. Civ. App.) 27 S. W. 839.

<sup>80</sup> Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Port of Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; Amy v. Selma, 77 Ala. 103; City of Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; Ross v. Wimberley, 60 Miss. 345, overruling Port Gibson v. Moore, 21 Miss. 157; Blackburn v. Oklahoma City, 1 Okl. 292, 31 Pac. 782, 33 Pac. 708; BROADFOOT v. CITY OF FAYETTEVILLE, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610, Cooley, Cas. Mun. Corp. 93; RUMSEY v. TOWN OF SAUK CENTRE, 59 Minn. 316, 61 N. W. 330, Cooley, Cas. Mun. Corp. 33; SHAPLEIGH v. CITY OF SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319.

Mandamus will lie to compel a city to pay a judgment rendered against a village of which the city is the legal successor. Lee v. City of Thief River Falls, 82 Minn. 88, 84 N. W. 654.

<sup>81</sup> Washburn Waterworks Co. v. City of Washburn, 129 Wis. 73, 108 N. W. 194.

<sup>82</sup> Ex parte Strahl, 16 Iowa, 369; Ritchie v. City of South Topeka, 38 Kan. 368, 16 Pac. 332; Ferrell v. City of Opelika, 144 Ala. 135, 39 South. 249.

<sup>83</sup> Garey v. City of Galveston, 42 Tex. 627; Baader v. Town of Cullman, 115 Ala. 539, 22 South. 19.

**CHAPTER V****THE CHARTER**

38. Municipal Charters.
39. Form and Contents of Charters.
40. Municipal Powers: Inherent—Express—Implied.
41. Exercise of Powers.
42. Charter Powers Classified.
43. Territorial Limit of Municipal Authority.
44. Amendment and Repeal of Charter.

**MUNICIPAL CHARTERS**

38. A municipal charter, whatever be its form, is a written document constituting the persons residing within a fixed boundary, and their successors, a body corporate and politic for and within such boundary, and prescribing the powers, privileges, and duties of the corporation.

"A municipal charter granted by the crown in England is a written instrument in the form of letters patent, with the great seal appended to it, addressed to all the subjects, and constituting the persons therein named, and their successors, a body corporate for or within the place therein specified, and prescribing the powers and duties of the corporation thereby created."<sup>1</sup> The power to grant this charter has been called the "flower of the prerogative."<sup>2</sup> And yet a municipality thus created possesses only the common-law powers and qualities of a corporation. Indeed, royal charters were granted only to organized communities having already a recognized municipal existence.<sup>3</sup> Where privileges and powers are to be conferred which are not recognized by the common or statute law—where special and unusual powers are to be granted—an act

<sup>1</sup> 1 Dill. Mun. Corp. § 82.

<sup>2</sup> Willc. Mun. Corp. 25.

<sup>3</sup> People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107.

of Parliament is necessary, giving a special charter to the corporation.<sup>4</sup> Moreover, the royal charter is wholly inoperative until accepted by the persons therein named as incorporators, whereas the parliamentary charter is a public law which all subjects are bound to obey.<sup>5</sup>

Excepting only municipalities by prescription and at common law, all municipal corporations in England—even those called municipal corporations by implication—have their municipal charters. The municipal corporation by implication relies upon a royal charter or act of Parliament for its existence and authority. There is an omission, however, in the act or charter to expressly declare the community a corporation; and so its corporate character must be implied from the charter, and the extent of the powers therein conferred upon it. Municipal corporations by prescription and implication have been held to exist in the United States.<sup>6</sup>

As has been already pointed out, municipal corporations in the United States, with reference to the mode of their creation, are divisible into two great classes: (a) Corporations created by special act of the Legislature; and (b) corporations organized under general incorporation statutes. Every municipal corporation has; or should have, as a warrant for its existence and authority, some official document issued under law by some duly constituted ministerial agent, showing its constitution and the limits of its authority. This document, which is usually called its charter, when issued under a special act, is usually in the form of a duly certified copy of such act, under the great seal of the state; but when issued under the authority of general statutes it may take the form of either a complete charter, as in the case of self-chartered cities,<sup>7</sup> or a court decree, or a certificate showing the fact of incor-

<sup>4</sup> 1 Kyd, Corp. 61; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

<sup>5</sup> Ang. & A. Corp. § 69; *President, etc., of City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law, 385.

<sup>6</sup> See ante, § 15.

<sup>7</sup> See ante, § 12, p. 44.

poration for municipal purposes. The charter of the corporation organized under a general law is sometimes authorized to be formulated by a court or board or officer designated in the act, whose function is ministerial only, and the resulting duty is an intelligent conformation of the general law to the particular corporation by specifying its name and municipal boundaries, and transcribing the grant of powers contained in the general incorporation statute. In states wherein a delegation of legislative power for municipal purposes is authorized by the Constitution, little difficulty arises in determining the validity of the charter and of the powers therein granted, since upon this sublegislature is conferred, *ex necessitate rei*, the legislative discretion.<sup>8</sup> But where the legislative grant of power to organize under general law is made without constitutional authority to delegate legislative power, the acts of these officers and boards, and even of the courts, are necessarily ministerial only;<sup>9</sup> and, if they in any such case are empowered to exercise legislative powers in the organization, such legislative acts are unconstitutional and void;<sup>10</sup> and, if the portion of the charter of this character is large, or is inseparable from the rest of the work, the entire charter will be void, and the corporation a nullity.<sup>11</sup>

#### FORM AND CONTENTS OF CHARTER

.39. A municipal charter requires for its validity no particular form of words, but is valid and effective if the language employed manifests legislative intention thereby to erect a municipality.

<sup>8</sup> Cooley, Const. Lim. (6th Ed.) 78.

<sup>9</sup> Granby Mining & Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246; 1 Mor. Priv. Corp. § 15; 1 Thomp. Priv. Corp. § 110; Mayor, etc., of City of Morristown v. Shelton, 1 Head (Tenn.) 24.

<sup>10</sup> Ex parte Chadwell, 3 Baxt. (Tenn.) 98; Greeneville & P. R. Narrow Gauge R. Co. v. Johnson, 8 Baxt. (Tenn.) 332.

<sup>11</sup> Cooley, Const. Lim. (6th Ed.) 210-214.

This document may contain a description of the territory, and a full outline of the powers, such as appears in special charters, or it may be merely a certificate of the fact of incorporation of the specified municipality, in which case reference must necessarily be had to the general statutes for powers and privileges, and to other official documents showing boundaries and other details as essential conditions precedent to the granting of the charter.

As we have heretofore seen, the words usually employed to establish a corporation are "found," "erect," "establish," "create," or "incorporate";<sup>12</sup> but none of them is essential. If the words employed in the charter grant the powers essential to a corporation, or otherwise evince the intention of the Legislature to found a municipal corporation by that particular act of legislation, then the charter is sufficient for that purpose, and the municipality is accordingly created.<sup>13</sup> The absence of express provisions respecting the incidents which are inherent in a corporation, such as the power to sue and be sued, to have a seal, or to enact by-laws, does not render the charter void;<sup>14</sup> and in more than one case it has been decided that the omission of the name of the corporation is not a fatal defect, provided the same may be inferred from the terms of the charter.<sup>15</sup> Indeed, it may be regarded as settled law that a corporation may be created by implication, as well as by the use of the customary words in the charter.<sup>16</sup> But the implication must be natural and necessary, and if, besides the absence of the usual words of incorporation, and the omission of the essential properties thereof, there is no language from which either may be implied by the use of the recognized rules

<sup>12</sup> 1 Kyd, Corp. 62; 2 Kent, Comm. 27.

<sup>13</sup> 1 Dill. Mun. Corp. §§ 42, 43.

<sup>14</sup> 1 Kyd, Corp. 63; Conservators v. Ash, 10 Barn. & C. 349.

<sup>15</sup> School Com'rs v. Dean, 2 Stew. & P. (Ala.) 190; Trustees of Ministerial & School Fund in Levant v. Parks, 10 Me. 441.

<sup>16</sup> 1 Dill. Mun. Corp. § 42.

of interpretation, then the charter is essentially defective, and the municipality is not created thereby.<sup>17</sup>

### *Charter Outlined*

In the American democracy our modern charters are all framed upon the same general model as the parliamentary charters, but there is great variety in the special powers conferred. An outline of the general features of the modern charter for an American municipality is the following:

(1) The inhabitants of the town or city by its proper name are constituted a body politic and corporate, with right of perpetual succession, and power to use a common seal, sue and be sued, purchase and hold property, etc.

(2) The territorial boundaries are distinctly defined, and the division of the territory into wards.

(3) The governing body of the corporation is ordained, composed of one or two bodies, and usually called aldermen or councilmen.

(4) The qualifications of the voters are prescribed, commonly the same as voters at state elections; but sometimes the voters are required to be property owners residing within the corporate limits, or owners of real estate within the limits residing elsewhere.

(5) The officers to be chosen, and the mode of their election.

(6) An enumeration of the powers of the city council, such as to levy and collect taxes, make local improvements, enact local ordinances, punish violations thereof, borrow money, make streets, hold courts, and numerous other appropriate municipal powers.

This charter, resembling the Constitution of the state, is the paramount law of the municipality.<sup>18</sup> To it resort must neces-

<sup>17</sup> Stebbins v. Jennings, 10 Pick. (Mass.) 172; Wells v. Burbank, 17 N. H. 393; Medical Inst. of Geneva College v. Patterson, 5 Denio (N. Y.) 618; Myers v. Irwin, 2 Serg. & R. (Pa.) 368.

<sup>18</sup> Platt v. City and County of San Francisco, 158 Cal. 74, 110 Pac. 304.

The rule is general, and applicable to the corporate authorities of

sarily be had to determine questions of municipal law and power. But with it must be considered, also, the state statutes and Constitution, and the general jurisprudence of America, and the public policy of the state.<sup>19</sup>

Under familiar rules, as we shall see more fully herein-after, those provisions of the special charter which are in contravention of the Constitution are, like any other unconstitutional statute, void; but such result does not follow from their conflict with a preceding general statute.<sup>20</sup> A subsequent general statute, however, may operate to repeal charter provisions in conflict with it, as will also, of course, any subsequent constitutional provision, for it is the paramount law of the state, and to it all legislation, previous or subsequent, not granting vested rights, must yield.<sup>21</sup>

#### MUNICIPAL POWERS: INHERENT—EXPRESS—IMPLIED

40. The municipality possesses no other powers than—
  - (a) Those expressly enumerated in the charters;
  - (b) Such as are necessary for their appropriate use and execution;
  - (c) Such as are inherent in every municipal corporation.

all municipal bodies, that, where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. *Zottman v. City and County of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

<sup>19</sup> *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33; *Cooley, Const. Lim.* (6th Ed.) pp. 238, 239; *City of Mt. Pleasant v. Breeze*, 11 Iowa, 399; *City of Ft. Scott v. W. G. Eads Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437.

<sup>20</sup> *Babcock v. City of Helena*, 34 Ark. 499; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Gorum v. Mills*, 34 N. J. Law, 177; *City of Mobile v. Dargan*, 45 Ala. 310; *City of Leavenworth v. Norton*, 1 Kan. 432.

<sup>21</sup> *Daniel v. Mayor, etc., of City of Memphis*, 11 Humph. (Tenn.) 582; *State ex rel. Waring v. Mayor, etc., of Mobile*, 24 Ala. 701; *People v. Morris*, 13 Wend. (N. Y.) 325; *Wallace v. Board of Trustees of Sharon Tp.*, 84 N. C. 164; *Wiley v. Corporation of Bluffton*,

A municipal corporation has no element of sovereignty, but is a mere local agency of the state.<sup>22</sup> It serves but as an instrumentality established by the Legislature to carry out its will in regard to local governmental functions,<sup>23</sup> though it also has certain other objects that are peculiarly local. Nevertheless, since a municipal corporation is simply a creation of the Legislature, the powers which it possesses and can exercise are only those which the law gives it. By this is not meant that the municipality possesses only such powers as are expressly granted in its charter. There are other powers necessarily or fairly implied in or incident to the powers expressly granted, and also certain powers essential to the declared object and purpose of the corporation, not simply convenient, but indispensable, which may be exercised by the municipality.<sup>24</sup>

Inherent powers are such as are necessary to and inseparable from every corporation, and they come into existence as a matter of course as soon as a municipality is created. They are the common-law powers of a corporation enumerated by Blackstone<sup>25</sup> as follows: (1) To have perpetual succession; (2) to sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do other acts as a natural person; (3) to purchase, hold, and sell property, real and per-

111 Ind. 152, 12 N. E. 165; Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 23 Sup. Ct. 234, 47 L. Ed. 249; City of Mobile v. Dargan, *supra*.

<sup>22</sup> Whiting v. Town of West Point, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750.

<sup>23</sup> Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 215.

<sup>24</sup> City of Independence v. Cleveland, 167 Mo. 384, 67 S. W. 216; City of Winchester v. Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; McALLEN v. HAMBLIN, 129 Iowa, 329, 105 N. W. 593, 5 L. R. A. (N. S.) 434, 6 Ann. Cas. 980, Cooley, *Cas. Mun. Corp.* 97; Farwell v. City of Seattle, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; City of New London v. Brainard, 22 Conn. 552; Mayo v. Dover & Foxcroft Village Fire Co., 96 Me. 539, 53 Atl. 62; Schneider v. City of Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

<sup>25</sup> 1 Blackstone, *Comm.* 475.

sonal, for the benefit of the municipality; (4) to have a common seal, alterable at pleasure; and (5) to make by-laws and ordinances for the government of the corporation.<sup>26</sup> Sometimes other powers, because essential to a corporation to enable it to carry out the purposes of its creation, are spoken of as inherent. Such powers, however, may be sustained as implied or incidental powers.

- 2) Express powers include, of course, only those that are granted in express words by the special charter or the general law under which the corporation is organized. It is wise and necessary that the charter should contain an enumeration of the powers and privileges intended to be granted the municipal corporation, and the duties to be imposed upon it. In the special charters these powers are varied in character and extent, and also in form. In the charters obtained under general statutes, the enumeration is generally abundant, and often tedious and redundant. This, however, within bounds, is preferable to the omission of powers intended to be granted, and leaving them to the doubtful source of judicial implication.
- 3) The term "implied powers" includes all other than inherent or express powers, and is used to designate those powers which arise by natural implication from the grant of express power or by necessary inference from the purposes or functions of the corporation. The determination as to what powers may be implied, as well as the extent of powers expressly granted, is, therefore, largely a matter of construction. Generally speaking, municipal charters are to be strictly construed,<sup>27</sup> and all reasonable doubts as to the existence of a power in a municipality must be resolved against it.<sup>28</sup> Never-

<sup>26</sup> Ball v. Texarkana Water Corporation (Tex. Civ. App.) 127 S. W. 1068.

<sup>27</sup> City of St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554; City of Port Huron v. McCall, 46 Mich. 565, 10 N. W. 23; City of Henderson v. Young, 119 Ky. 224, 83 S. W. 583; Henderson v. City of Covington, 77 Ky. (14 Bush) 312.

<sup>28</sup> Scott v. City of La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 673; City of Lafayette v. Cox, 5 Ind. 38; Meday v. Borough of Ruther-

theless, the charter must be rationally construed,<sup>29</sup> and whenever a necessary power can be fairly implied, it should not be excluded or impaired by strict construction,<sup>30</sup> especially where the power relates to functions that are private or municipal in character,<sup>31</sup> or are especially designed to promote the general good.<sup>32</sup>

#### *General Welfare Clause*

When powers are enumerated in a special act or charter which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the powers, but merely as declaratory of the pre-existing powers, or rather of those which are essential to the very nature of a municipal corporation, to enable it to accomplish the end for which it is created. But the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated.<sup>33</sup> The difficulty of making specific enumeration of all such powers as the Legislature may intend to delegate to the municipality renders it necessary to

ford, 65 N. J. Law, 645, 48 Atl. 529; Los Angeles City Water Co. v. City of Los Angeles (C. C.) 88 Fed. 720, affirmed 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886; Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 69 N. E. 451, 59 L. R. A. 631; Stern v. City of Fargo, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665.

<sup>29</sup> State v. Butler, 178 Mo. 272, 77 S. W. 560; Torrent v. Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 132.

<sup>30</sup> State v. Butler, 178 Mo. 272, 77 S. W. 560; Scott v. City of La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Groner v. City Council of Portsmouth, 77 Va. 488; McCredie v. City of Buffalo, 2 How. Prac. N. S. (N. Y.) 336; In re Village of Kenmore, 59 Misc. Rep. 388, 110 N. Y. Supp. 1008; GREEN v. CITY OF CAPE MAY, 41 N. J. Law, 45, Cooley, Cas. Mun. Corp. 99; Cary v. Blodgett, 10 Cal. App. 463, 102 Pac. 668.

<sup>31</sup> City of Henderson v. Young, 119 Ky. 224, 83 S. W. 583; City of Port Huron v. McCall, 46 Mich. 565, 10 N. W. 23.

<sup>32</sup> Bethlehem City Water Co. v. Bethlehem Borough, 231 Pa. 454, 80 Atl. 984.

<sup>33</sup> CITY OF CRAWFORDSVILLE v. BRADEN, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214, Cooley, Cas. Mun. Corp. 100.

confer some power in general terms.<sup>34</sup> Consequently the enumeration of special powers in a municipal charter is often concluded with a clause conferring general authority to pass all ordinances which may be necessary for the promotion of good order and the general welfare of the municipality, and are not inconsistent with the Constitution and general laws of the state. In some special charters there is no enumeration of the subjects upon which the corporation shall have power to legislate, but only a general grant of power to pass all ordinances which are necessary to the good order and well-being of the corporation.<sup>35</sup> In either case this "general welfare clause" must be construed as conferring no other powers than such as are within the ordinary scope of municipal authority, or which are necessary to accomplish municipal purposes.<sup>36</sup>

The distinction to be observed between the two charters in construing their provisions is considered by Judge Dillon to be essential, "for the powers granted by the general welfare clause, if not stated alone, may be limited, qualified, or, when such intent is manifest, impliedly taken away, by provisions specifying the particular purposes for which by-laws may be made."<sup>37</sup> On the other hand, it would seem that since, under the general welfare clause, the corporation obtains all the usual and necessary powers of the municipality, the specific enumeration of powers might confer others not usual; and thus the charter, containing both specific enumeration and

<sup>34</sup> *Porter v. Vinzant*, 49 Fla. 213, 38 South. 607, 111 Am. St. Rep. 93.

<sup>35</sup> *1 Beach, Pub. Corp.* §§ 583, 1269; *Tied. Mun. Corp.* § 135; *TOWN OF NEWPORT v. BATESVILLE & B. RY. CO.*, 58 Ark. 270, 24 S. W. 427, Cooley, *Cas. Mun. Corp.* 106; *City of Nashville v. Linck*, 12 Lea (Tenn.) 499; *City of Brooklyn v. Furey*, 9 Misc. Rep. 193, 30 N. Y. Supp. 349.

<sup>36</sup> *Spaulding v. City of Lowell*, 23 Pick. (Mass.) 71; *City of New Orleans v. Philippi*, 9 La. Ann. 44; *City of Leavenworth v. Norton*, 1 Kan. 432. But see *Cross v. Mayor, etc., of Town of Morristown*, 33 N. J. Law, 57.

<sup>37</sup> *1 Dill. Mun. Corp.* § 315.

general welfare clauses, might give more powers than one conferring powers only by the general welfare clause. In case of challenge of municipal power, it is probable that the result would depend upon the question whether the court leans towards the doctrine of strict construction, rather than liberal; but the "general welfare clause" would not enlarge an enumerated power expressly limited or restricted, for such construction would make the general clause repeal a special one in the same statute, and thus violate an established rule of interpretation.<sup>38</sup>

The general powers thus given to the municipality are as a rule designed to confer powers other than those specifically mentioned;<sup>39</sup> but powers specifically conferred cannot be enlarged by the general clause,<sup>40</sup> nor can the general welfare clause confer any powers contrary to the express provisions of the charter.<sup>41</sup> As a general rule it may be said that the powers given to a municipality under the general welfare clause should be construed with reference to the purpose of its incorporation, and, where particular powers are expressly conferred, and there is also a general grant of powers, such general grant includes all powers fairly within the terms of the grant, and essential to the purpose of the municipality, and not in conflict with the particular powers conferred.<sup>42</sup>

#### *Same—Powers Conferred*

Under a general grant of authority to pass such by-laws as shall be needful to the good order of the city, power has been upheld to "establish all suitable ordinances for administering

<sup>38</sup> *State v. Ferguson*, 33 N. H. 424; *Clark v. City of South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465.

<sup>39</sup> *Mayor, etc., of City of Nashville v. Linck*, 80 Tenn. (12 Lea) 499; *Porter v. Vinzant*, 49 Fla. 213, 38 South. 607, 111 Am. St. Rep. 93.

<sup>40</sup> *CITY OF CHICAGO v. GUNNING SYSTEM*, 114 Ill. App. 377, affirmed 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892, Cooley, Cas. Mun. Corp. 129.

<sup>41</sup> *City of Brooklyn v. Furey*, 9 Misc. Rep. 193, 30 N. Y. Supp. 349.

<sup>42</sup> *State ex rel. Ellis v. Tampa Waterworks Co.*, 56 Fla. 558, 47 South. 358, 19 L. R. A. (N. S.) 183.

the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits.”<sup>43</sup> The general welfare clause has also been held to confer power to prevent the keeping of bawdy-houses;<sup>44</sup> the feeding of cows on distillery slops, and selling their milk within the city;<sup>45</sup> the public exposure for sale, or sale of merchandise on Sunday;<sup>46</sup> the sale of liquor on Sunday;<sup>47</sup> the keeping of saloons, restaurants and other places of public entertainment open after 10 o’clock at night;<sup>48</sup> the carrying on of the laundry business in a certain portion of the city;<sup>49</sup> to forbid all disorderly shouting, dancing, etc., in streets and public places;<sup>50</sup> to regulate the keeping and selling of gunpowder within the corporate limits;<sup>51</sup> to require elevators inside all stores to be inclosed;<sup>52</sup> to prohibit the throwing of heavy or dangerous articles from upper stories of buildings into streets and open spaces near them used as public passways;<sup>53</sup> to establish fire limits, and to prevent the erection therein of wooden buildings;<sup>54</sup> to prohibit cruelty to animals;<sup>55</sup> to prohibit visiting at gambling houses;<sup>56</sup> and to

<sup>43</sup> State v. Merrill, 37 Me. 329.

<sup>44</sup> State ex rel. Burton v. Williams, 11 S. C. 288.

<sup>45</sup> Johnson v. Simonton, 43 Cal. 242.

<sup>46</sup> City Council of Charleston v. Benjamin, 2 Strob. (S. C.) 508, 49 Am. Dec. 608.

<sup>47</sup> Megowan v. Commonwealth, 2 Metc. (Ky.) 3; State v. Welch, 36 Conn. 215.

<sup>48</sup> State v. Freeman, 38 N. H. 426; Morris v. City Council of Rome, 10 Ga. 532; President, etc., of Village of Platteville v. Bell, 43 Wis. 488.

<sup>49</sup> In re Hang Kie, 69 Cal. 149, 10 Pac. 327.

<sup>50</sup> Com’rs of Town of Washington v. Frank, 46 N. C. 436; City of St. Charles v. Meyer, 58 Mo. 86.

<sup>51</sup> Frederick v. City Council of Augusta, 5 Ga. 561.

<sup>52</sup> City of New York v. Williams, 15 N. Y. 502.

<sup>53</sup> City Council of Charleston v. Elford, 1 McMUL. (S. C.) 234.

<sup>54</sup> King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; Knoxville Corp. v. Bird, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.

<sup>55</sup> City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791.

<sup>56</sup> Ex parte Lane, 76 Cal. 587, 18 Pac. 677.

fix the time and places of holding public markets for the sale of food, and regulating the same.<sup>57</sup>

*Same—Powers Denied*

But, on the contrary, it has been held that the general welfare clause does not authorize a city to aid in constructing a plankroad or tollbridge by a private company beyond the corporate limits;<sup>58</sup> nor to require the proprietor of a theater, circus, or other licensed place of exhibition to pay a police officer for attendance upon the place;<sup>59</sup> nor to subject to a fine "any person whose known character is that of a prostitute";<sup>60</sup> nor to levy taxes upon retailers of ardent spirits;<sup>61</sup> nor to require druggists to furnish verified statements quarterly of the kind and quantity of intoxicating liquors sold, and to whom;<sup>62</sup> nor to exact a license fee from peddlers in the discretion of the mayor;<sup>63</sup> nor to require cotton merchants to keep a record of their purchases of loose cotton;<sup>64</sup> nor to prohibit street processions, with musical instruments, banners, torches, singing, and shouting;<sup>65</sup> nor to require a license tax for a temporary stand for the sale of lemonade, cake, etc.;<sup>66</sup> nor to prescribe a different mode of trial and punishment, in addition to that provided by the state law, for enticing and harboring seamen;<sup>67</sup> nor to regulate and license the sale of liq-

<sup>57</sup> Kinsley v. City of Chicago, 124 Ill. 359, 16 N. E. 260; Ketchum v. City of Buffalo, 14 N. Y. 356.

<sup>58</sup> City Council of City of Montgomery v. Montgomery & Wetumpka Plank Road Co., 31 Ala. 76.

<sup>59</sup> Waters v. Leech, 3 Ark. 110.

<sup>60</sup> Buell v. State, 45 Ark. 336.

<sup>61</sup> Ex parte Burnett, 30 Ala. 461; Com'r's of Town of Asheville v. Means, 29 N. C. 406.

<sup>62</sup> City of Clinton v. Phillips, 58 Ill. 102, 11 Am. Rep. 52.

<sup>63</sup> Town of State Center v. Barenstein, 66 Iowa, 249, 23 N. W. 652.

<sup>64</sup> Long v. Taxing Dist. of Shelby County, 7 Lea (Tenn.) 134, 40 Am. Rep. 55.

<sup>65</sup> In re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

<sup>66</sup> Barling v. West, 29 Wis. 307, 9 Am. Rep. 576.

<sup>67</sup> Mayor, etc., of City of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452.

uors, in addition to the state regulation and license;<sup>68</sup> nor to prohibit the retail of liquors by one duly licensed by the state,<sup>69</sup> nor to forbid it during any divine service held within the corporate limits.<sup>70</sup> These cases are sufficient to show the general current of judicial opinion in the United States to sustain, under the general welfare clause of the charter, all ordinances tending to promote the general welfare and preserve the peace and good order of society, and protect persons, health, and property of citizens, unless they contravene some constitutional provision.

### EXERCISE OF POWERS

41. When a power is conferred upon a municipal corporation, and the manner in which the power is to be exercised is prescribed, that mode must be followed; and in so far as the power involves the exercise of judgment or discretion the execution of that power cannot be delegated.

#### *Mode of Exercise of Powers in General*

When a power is conferred on a municipal corporation, and the charter or statute does not prescribe the manner in which the power shall be exercised, the corporate authorities are necessarily clothed with a reasonable discretion to determine the mode in which the act shall be performed, and all reasonable methods of executing the power are permissible.<sup>71</sup> But, if the mode in which the power can be exercised is pre-

<sup>68</sup> Commonwealth v. Dow, 10 Metc. (Mass.) 382; Loeb v. City of Attica, 82 Ind. 175, 42 Am. Rep. 494.

<sup>69</sup> Ex parte Burnett, 30 Ala. 461.

<sup>70</sup> Gilham v. Wells, 64 Ga. 192.

<sup>71</sup> Walker v. Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 49 Am. St. Rep. 222; Scott v. City of La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Kirkham v. Russell, 76 Va. 956.

scribed in the charter, that mode must be followed.<sup>72</sup> In such cases the mode prescribed is the measure of the power, and aside from the mode designated the power does not exist.<sup>73</sup> Thus, if the charter provides that a particular power can be exercised only by resolution, an execution thereof in any manner other than by resolution is void.<sup>74</sup> On the other hand, if the charter provides that the power can be exercised by ordinance, an attempt to exercise it by contract or resolution would be illegal.<sup>75</sup> In the absence of any direction in the charter, the municipality may, through its council, prescribe rules of procedure in the exercise of its powers.<sup>76</sup>

#### *Delegation of Power*

Though it is generally conceded that the state Legislature may confer on municipal corporations sovereign powers in such measure as it deems wise and proper, there is more or less conflict of opinion on the question whether the governing body of a municipality may delegate its powers. Though it has been repeatedly held that a municipality has no such power of delegation,<sup>77</sup> unless the state expressly authorizes such delegation,<sup>78</sup> yet it is now generally recognized that the governing body of the municipality may delegate to subordinate officers or boards powers and functions that are merely ministerial or

<sup>72</sup> *Page v. Belvin*, 88 Va. 985, 14 S. E. 843; *City of Fort Scott v. W. G. Eads Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437; *City of Nevada, to Use of Gilfillan, v. Eddy*, 123 Mo. 546, 27 S. W. 471; *Zottman v. City and County of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *First Presbyterian Church of Ft. Wayne v. City of Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35.

<sup>73</sup> *Page v. Belvin*, 88 Va. 985, 14 S. E. 843; *Zottman v. City and County of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

<sup>74</sup> *McCoy v. Briant*, 53 Cal. 247.

<sup>75</sup> *City of Unionville v. Martin*, 95 Mo. App. 28, 68 S. W. 605.

<sup>76</sup> *City of Carbondale v. Wade*, 106 Ill. App. 654.

<sup>77</sup> *City of Oakland v. Carpentier*, 13 Cal. 540; *State v. Garibaldi*, 44 La. Ann. 809, 11 South. 36; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *Gale v. Village of Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *City of Unionville v. Martin*, 95 Mo. App. 28, 68 S. W. 605.

<sup>78</sup> *State v. Garibaldi*, 44 La. Ann. 809, 11 South. 36.

administrative.<sup>79</sup> On the other hand, it is equally well settled that powers involving the exercise of judgment and discretion, as is the case with such legislative or quasi judicial powers as are possessed by the governing body of the municipality, cannot be delegated.<sup>80</sup> Ministerial functions are those that are absolute, fixed, and certain, in the performance of which there is nothing left to the judgment or discretion of the officer or board.<sup>81</sup> Such functions, as has been said, may be delegated, so long as no attempt is made to give the subordinate board or officer the power to finally determine the policy of the corporation.

#### *Surrender of Authority*

As a municipal corporation cannot delegate its powers, so, too, it cannot surrender, abrogate, or contract away its authority.<sup>82</sup> Especially is this true as to those municipal func-

<sup>79</sup> Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666; Durant v. Mayor, etc., of Jersey City, 25 N. J. Law, 309; Brady v. City of Bayonne, 57 N. J. Law, 379, 30 Atl. 968; JEWELL BELTING CO. v. VILLAGE OF BERTHA, 91 Minn. 9, 97 N. W. 424, Cooley, Cas. Mun. Corp. 168; Neill v. Gates, 152 Mo. 585, 54 S. W. 460; Harcourt v. Common Council of Asbury Park, 62 N. J. Law, 158, 40 Atl. 690; Dancer v. Town of Mannington, 50 W. Va. 322, 40 S. E. 475; CITY OF BIDDEFORD v. YATES, 104 Me. 506, 72 Atl. 335, 15 Ann. Cas. 1091, Cooley, Cas. Mun. Corp. 108.

<sup>80</sup> San Francisco Gaslight Co. v. Dunn, 62 Cal. 580; Thompson v. Board of Trustees of City of Alameda, 144 Cal. 281, 77 Pac. 951; JEWELL BELTING CO v. VILLAGE OF BERTHA, 91 Minn. 9, 97 N. W. 424, Cooley, Cas. Mun. Corp. 168; Neill v. Gates, 152 Mo. 585, 54 S. W. 460; Danforth v. Mayor, etc., of City of Paterson, 34 N. J. Law, 163; CITY OF BIDDEFORD v. YATES, 104 Me. 506, 72 Atl. 335, 15 Ann. Cas. 1091, Cooley, Cas. Mun. Corp. 108.

<sup>81</sup> JEWELL BELTING CO. v. VILLAGE OF BERTHA, 91 Minn. 9, 97 N. W. 424, Cooley, Cas. Mun. Corp. 168; CITY OF BIDDEFORD v. YATES, 104 Me. 506, 72 Atl. 335, 15 Ann. Cas. 1091, Cooley, Cas. Mun. Corp. 108.

<sup>82</sup> State ex rel. Townsend v. Board of Park Com'rs, 100 Minn. 150, 110 N. W. 1121, 9 L. R. A. (N. S.) 1045; Brummitt v. Ogden Waterworks Co., 33 Utah, 289, 93 Pac. 828; Gale v. Village of Kalamazoo, 1 Mich. N. P. 5; Third Municipality of New Orleans v. Ursuline Nuns, 2 La. Ann. 611; National Waterworks Co. v. Kansas City, 20 Mo. App. 237; Whitney v. Mayor, etc., of City of New York, 6 Abb. N. C. (N. Y.) 329.

tions which are regarded as mandatory.<sup>83</sup> It is true that in a few instances contracts assuming to surrender municipal rights have been sustained, on the ground that to invalidate such contracts would contravene the constitutional provision forbidding impairment of the obligation of contracts;<sup>84</sup> but it is doubtful if the provision applies, except when repudiation of contracts is attempted by legislation.

### *Judicial Supervision*

In the exercise of the powers conferred in its charter, a municipal corporation is not in general subject to the control or supervision of the courts. This is unqualifiedly true as to all matters involving discretion,<sup>85</sup> and matters involving questions of purely municipal policy.<sup>86</sup> The expediency of the acts of the governing body of the municipality in matters over which it has jurisdiction is not a judicial question, and so long as that body does not transcend the scope of its authority, or violate any of the limitations on the exercise of its powers, it will not, in the absence of fraud, be interfered with by a court of law or equity.<sup>87</sup> The courts will interfere only when the governing body has exceeded its powers,<sup>88</sup> or where it is

<sup>83</sup> Edwards v. City of Watertown, 61 How. Prac. 463; Gillett v. Board of Sup'rs of Logan County, 67 Ill. 256.

<sup>84</sup> State ex rel. Attorney General v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

<sup>85</sup> Enders v. Friday, 78 Neb. 510, 111 N. W. 140, 15 Ann. Cas. 685; Swan v. City of Indianola, 142 Iowa, 731, 121 N. W. 547; Adams v. City of Milwaukee, 144 Wis. 371, 129 N. W. 518; Jones v. Town of North Wilkesboro, 150 N. C. 646, 64 S. E. 866; Ward v. Piper, 69 Kan. 773, 77 Pac. 699.

<sup>86</sup> Hibbard v. Barker, 84 Kan. 848, 115 Pac. 561; Keely v. City of Atlanta, 69 Ga. 583.

<sup>87</sup> Murphy v. Chicago, R. I. & P. Ry. Co., 247 Ill. 614, 93 N. E. 381; Reed v. City of Anoka, 85 Minn. 294, 88 N. W. 981; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587.

<sup>88</sup> Johnson v. City of Indianapolis, 174 Ind. 691, 93 N. E. 17; Crouch v. City of McKinney, 47 Tex. Civ. App. 54, 104 S. W. 518; City of Frostburg v. Wineland, 98 Md. 239, 56 Atl. 811, 64 L. R. A. 627, 1 Ann. Cas. 783; State v. Hager, 91 Mo. 452, 3 S. W. 844; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587.

shown that it has acted in an unreasonable or capricious spirit,<sup>89</sup> or has been influenced by malice or fraud.<sup>90</sup>

The fraud that will authorize the court's interference in the matter of municipal action is not that the power exercised has resulted in individual hardship in its execution, or that, in the working out of the general scheme, an individual burden is imposed without a corresponding benefit conferred, but only when the act of the municipal body is so unreasonable, oppressive, and subversive of the rights of the citizen in the general purpose declared, as to indicate clearly an attempted abuse rather than a legitimate use of the power.<sup>91</sup> Even where the act of the governing body is dictated by a bad motive or is unreasonable the courts will not interfere, if the act is in the execution of an express legislative power.<sup>92</sup>

### CHARTER POWERS CLASSIFIED

42. The powers, functions, and duties of a municipal corporation are divisible into two great classes:
- (a) GOVERNMENTAL: That is, those which are conferred and imposed upon a municipal corporation, as a local agency of limited and prescribed jurisdiction, to be exercised by it in administering the powers of the state, and promoting the public welfare within it.

<sup>89</sup> Murphy v. Chicago, R. I. & P. Ry. Co., 247 Ill. 614, 93 N. E. 381; Johnson v. City of Indianapolis, 174 Ind. 691, 93 N. E. 17; Smith v. City of New Albany, 175 Ind. 279, 93 N. E. 73; Town of La Grange v. Overstreet, 141 Ky. 43, 132 S. W. 169, 31 L. R. A. (N. S.) 951; City of Richmond v. Model Steam Laundry, 111 Va. 758, 69 S. E. 932.

<sup>90</sup> Town of La Grange v. Overstreet, 141 Ky. 43, 132 S. W. 169, 31 L. R. A. (N. S.) 951; People v. Grand Trunk Western Ry. Co., 232 Ill. 292, 83 N. E. 839.

<sup>91</sup> Heman v. Schulte, 166 Mo. 409, 66 S. W. 163.

<sup>92</sup> City of Chicago v. Ripley, 249 Ill. 466, 94 N. E. 931, 34 L. R. A. (N. S.) 1186, Ann. Cas. 1912A, 160; Murphy v. Chicago, R. I. & P. Ry. Co., 247 Ill. 614, 93 N. E. 381; Swan v. City of Indianola, 142 Iowa, 731, 121 N. W. 547; Rabbetto v. Mott, 60 N. J. Law, 413, 38 Atl. 857.

(b) **MUNICIPAL:** Those conferred and imposed for the special benefit and advantage of the urban community which is incorporated into a distinct corporate person or municipality.

Municipalities act in a dual capacity, the one corporate and the other governmental. To the former belong acts done in the management of property or rights held voluntarily for their own profit, though ultimately inuring to the benefit of the public; and to the latter belongs the discharge of duties imposed on them by the Legislature for the public benefit.<sup>93</sup> The powers and functions of the municipality may therefore be divided into two classes: (1) Governmental; and (2) municipal. Governmental functions have been defined and described by judges and authors so as to include all those which are legislative, judicial, discretionary, public and political, while municipal powers and duties are held to include all those which are ministerial, mandatory, peremptory, private, and corporate.<sup>94</sup> Under the head of "governmental powers" are accordingly classified (a) powers pertaining to the administration of justice; (b) all police powers; (c) power of eminent domain; (d) powers for the promotion of public education; (e) powers to maintain a fire department and extinguish fires; (f) all other charter powers to be exercised by the municipality, as an agency of the state, for the benefit of the public, in or for the exercise of which the corporation receives no consideration.<sup>95</sup> All other charter powers and duties, including not only those which are mandatory, such as the proper care of streets and alleys, but also those powers which are discretionary, such as the erection and maintenance of waterworks, gas-

<sup>93</sup> *Libby v. City of Portland*, 105 Me. 370, 74 Atl. 805, 26 L. R. A. (N. S.) 141, 18 Ann. Cas. 547; *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

<sup>94</sup> *Tied. Mun. Corp.* §§ 110-112.

<sup>95</sup> *Stedman v. City and County of San Francisco*, 63 Cal. 193; *Jones v. City of Richmond*, 18 Grat. (Va.) 517, 98 Am. Dec. 695.

works, and electric plants, from which profit may be derived by the municipality, are municipal.<sup>96</sup>

In the exercise of its governmental powers and functions the municipality represents the state; and the officers executing these powers are rather officers of the state than of the municipality, and, as such, they are peculiarly subject to the control of the state, while those officers who perform strictly municipal functions are municipal officers to be chosen by the corporation, and are not so subject to legislative control.<sup>97</sup> It has accordingly been held that the Legislature may create and appoint boards of fire and police commissioners, and vest them with power of selecting and appointing the police force;<sup>98</sup> and so, also, of park commissioners;<sup>99</sup> though it may have no power to appoint mayors or councilmen or street commissioners, whose duties are strictly municipal.<sup>1</sup> The judicial views of these distinct functions of a municipality are

<sup>96</sup> Mersey Dock Cases, 11 H. L. Cas. 687; City of Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Murphy v. City of Lowell, 12 $\frac{1}{2}$  Mass. 564; Grimes v. Town of Keene, 52 N. H. 335; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434.

<sup>97</sup> United States ex rel. Brown v. Memphis, 97 U. S. 284, 24 L. Ed. 937; State ex rel. Walsh v. Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83; State v. O'Connor, 54 N. J. Law, 36, 22 Atl. 1091; People v. McKinney, 52 N. Y. 374; Richmond Mayoralty Case, 19 Grat. (Va.) 673; STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4; State ex rel. Attorney General v. George, 23 Fla. 585, 3 South. 81; Stanfield v. State, 83 Tex. 317, 18 S. W. 577; State v. Nine Justices, 90 Tenn. 722, 18 S. W. 393; Green v. County of Fresno, 95 Cal. 329, 30 Pac. 544.

<sup>98</sup> Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; People v. McDonald, 69 N. Y. 362; Burch v. Hardwicke, 30 Grat. (Va.) 24, 32 Am. Rep. 640; State v. Hunter, 38 Kan. 578, 17 Pac. 177.

Contra, City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4.

<sup>99</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36.

<sup>1</sup> Richmond Mayoralty Case, 19 Grat. (Va.) 673; State ex rel. Reese v. Bogard, 128 Ind. 480, 27 N. E. 1113; Hathaway v. New Baltimore, 48 Mich. 251, 12 N. W. 186; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

not uniform, but in some instances quite conflicting and discordant, as illustrated by the able opinions of Judges Campbell and Cooley in two leading cases in Michigan,<sup>2</sup> emphasizing these distinctions, and by the masterly opinion of Chief Justice Denio in a celebrated New York case<sup>3</sup> denying the existence of these distinctions, and asserting that all municipal powers and functions are public.<sup>1</sup> The importance of the question arises out of the fact that upon its solution depend the power of legislative control, and also civil liabilities of corporations.<sup>2</sup> Suffice it here to say that the general trend of judicial opinion is unmistakably toward the double aspect of the municipality, and the recognition of the quasi private nature of the powers, offices, and property pertaining to it for the special benefit and peculiar advantage of its citizens and of the locality.

### TERRITORIAL LIMIT OF MUNICIPAL AUTHORITY

#### 43. The municipal authority is coextensive with the municipal boundaries, and generally is limited by them.

Since a municipal corporation is an agency of the state for local government, it is as a general rule restricted to its corporate limits in the exercise of its corporate powers.<sup>4</sup> The by-laws and ordinances of the corporation must, of course, prevail over the entire territory which is incorporated, and all persons within those boundaries to whom they are applicable. They are local laws, therefore, enacted or authorized by the

<sup>2</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>3</sup> Darlington v. Mayor, etc., of City of New York, 31 N. Y. 164, 88 Am. Dec. 248.

<sup>4</sup> State v. Cederaski, 80 Conn. 478, 69 Atl. 19; Donable's Adm'r v. Town of Harrisonburg, 104 Va. 533, 52 S. E. 174, 2 L. R. A. (N. S.) 910, 113 Am. St. Rep. 1056, 7 Ann. Cas. 519.

state, and all persons within the municipal jurisdiction are bound to respect and obey them.<sup>5</sup>

### *Exceptions*

The exceptions to the rule that the corporate limits are the boundary of corporate authority are few and special. They will be found generally in legislative acts giving jurisdiction to city boards of health over some district beyond the municipal boundaries, to the end that they may be enabled thus to protect the public health of the municipality. It is in fact generally conceded that the authority of the municipality may be extended over outside territory for police purposes.<sup>6</sup> Some acts give jurisdiction of territory outside its municipal boundaries from which it obtains its water supply;<sup>7</sup> and likewise to prevent nuisances in adjacent territory lying beyond the city limits.<sup>8</sup> This last power was maintained by the Supreme Court of Illinois to the extent of authorizing the city of Chicago to enforce an ordinance forbidding any person or corporation to carry on the business of slaughtering, rendering, etc., within a mile of the city limits, and thereby to abate, as a nuisance, the factory of the Chicago Packing Company, which was outside the city limits, and within the incorporated town of Lake, from which it held a license to carry on its business.<sup>9</sup> A city has also been held to possess implied power to make a contract with an adjoining landowner to give an out-

<sup>5</sup> Dodge v. Gridley, 10 Ohio, 173; Mayor, etc., of City of Knoxville v. King, 7 Lea (Tenn.) 441; Johnson v. Simonton, 43 Cal. 242; Swift v. City of Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; Plymouth Com'rs v. Pettijohn, 15 N. C. 591; City of Buffalo v. Schleifer, 2 Misc. Rep. 216, 21 N. Y. Supp. 913; Citizens' Gas & Mining Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624; Perdue v. Ellis, 18 Ga. 586; State v. Merrill, 37 Me. 329.

<sup>6</sup> Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85; Town of Gower v. Agee, 128 Mo. App. 427, 107 S. W. 999.

<sup>7</sup> Dunham v. City of New Britain, 55 Conn. 378, 11 Atl. 354.

<sup>8</sup> Gould v. City of Rochester, 105 N. Y. 46, 12 N. E. 275. See, also, Metropolitan Board of Health v. Heister, 37 N. Y. 661.

<sup>9</sup> Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221, 30 Am. Rep. 545.

let to its sewage beyond the city limits, and to control the necessary sewer system beyond its limits.<sup>10</sup> And in Wisconsin it has been said that a municipality may for municipal purposes maintain and operate a stone quarry outside the city limits.<sup>11</sup>

### AMENDMENT AND REPEAL OF CHARTER

44. The inherent and plenary power of the Legislature over a municipal corporation extends to the amendment of its charter in such manner and to such extent as may seem wise to the Legislature.

A municipal charter, whether granted by special law or obtained under general laws, may be repealed by legislative act, either general or special, unless forbidden by the Constitution.

#### *Amendment of Charter*

The right to amend the charter of a municipal corporation results from the inherent power of the Legislature over these agencies of government. The Legislature in the first instance decided and declared what powers should be exercised by the municipality, and how it should exercise them. New conditions arising may justly require a curtailing or enlargement of these powers, or a change in the mode of their exercise.<sup>12</sup> A new Legislature may assemble with new light upon the subject of corporations, and, in its wisdom, may add to or take from the municipal powers of one or of many corporations; and

<sup>10</sup> City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Cummins v. City of Seymour, 79 Ind. 491, 41 Am. Rep. 618.

<sup>11</sup> Schneider v. City of Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

<sup>12</sup> City of Reading v. Keppelman, 61 Pa. 233; Crook v. People ex rel. Jayne, 106 Ill. 237; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Daniel v. Mayor, etc., of City of Memphis, 11 Humph. (Tenn.) 582; Girard v. Philadelphia, 7 Wall. (U. S.) 1, 19 L. Ed. 53; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; People v. Morris, 13 Wend. (N. Y.) 325; City of Philadelphia v. Fox, 64 Pa. 169.

this may be done by general laws or by special laws, when not constitutionally forbidden.<sup>13</sup> In other words, since municipal charters are not contracts, but are granted for public purposes, they may be amended at the pleasure of the Legislature.<sup>14</sup> An entirely new charter may be enacted for the new corporation, or specific amendments made to the original.<sup>15</sup> Amendments may be made to the general corporation laws, or new general laws may be enacted, which will have the effect of modifying the charter. Any or all of these modes of amendment are open to the Legislature, subject, of course, to constitutional limitations.<sup>16</sup> If these laws, or any of them, in their operation and effect upon the municipal charter, are challenged in the courts for unconstitutionality, the question is to be tried by the same rules and standards as those arising

<sup>13</sup> *Sloan v. State*, 8 Blackf. (Ind.) 361; *Crook v. People ex rel. Jayne*, 106 Ill. 237; *Churchill v. Walker*, 68 Ga. 681; *Pancoast v. Troth*, 34 N. J. Law, 379; *Wallace v. Board of Trustees of Sharon Tp.*, 84 N. C. 164; *State ex rel. Mayor v. Palmer*, 10 Neb. 203, 4 N. W. 966.

But a general clause repealing all acts contrary to its provisions will not repeal the provisions of the charter, unless the intent of the Legislature to effect such repeal is clear. *Fish v. Branin*, 23 N. J. Law, 484; *Cross v. Mayor, etc., of Town of Morristown*, 33 N. J. Law, 57; *Bodine v. Common Council of City of Trenton*, 36 N. J. Law, 198; *Mayor, etc., of City of Cumberland v. Magruder*, 34 Md. 381; *People v. Clunie*, 70 Cal. 504, 11 Pac. 775; *City of East St. Louis v. Maxwell*, 99 Ill. 439; *Mayor, etc., of City of Griffin v. Inman*, 57 Ga. 370; *City of Harrisburg v. Sheck*, 104 Pa. 53; *Bond v. Hiestand*, 20 La. Ann. 139; *Tierney v. Dodge*, 9 Minn. 166 (Gil. 153).

<sup>14</sup> *Guild v. City of Chicago*, 82 Ill. 472; *People v. Morris*, 13 Wend. (N. Y.) 325; *Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Probasco v. Town of Moundsville*, 11 W. Va. 501; *City of Ensley v. Simpson*, 166 Ala. 366, 52 South. 61.

<sup>15</sup> *Smith, Mun. Corp.* § 116; *Tied. Mun. Corp.* §§ 32, 44.

<sup>16</sup> *State v. City of Toledo*, 48 Ohio St. 112, 23 N. E. 1061, 11 L. R. A. 729; *City of Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396; *People v. Morris*, 13 Wend. (N. Y.) 325; *Daniel v. Mayor, etc., of City of Memphis*, 11 Humph. (Tenn.) 582; *Crook v. People ex rel. Jayne*, 106 Ill. 237; *State ex rel. Mayor v. Palmer*, 10 Neb. 203, 4 N. W. 966; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Churchill v. Walker*, 68 Ga. 681.

upon other legislative enactments.<sup>17</sup> It is easy to see how a department of the government having power to create and to dissolve a municipality at pleasure should likewise have the power to change or alter its creature while existing under the jurisdiction of its creator. The only limitations upon this power are such as arise from conflict with vested rights, or from express constitutional provisions.<sup>18</sup> The decisions upon the exercise of this power are in apparent conflict, but may, perhaps, all be harmonized by recognizing, here as elsewhere, the dual character of the municipality, and the two classes of functions it must perform. In some states this right to amend a municipal charter is limited by a constitutional provision guaranteeing local self-government to the people. This right of the people has been upheld in well-considered decisions in New York,<sup>19</sup> Michigan,<sup>20</sup> and Indiana.<sup>21</sup> The general doc-

<sup>17</sup> Bowyer v. City of Camden, 50 N. J. Law, 87, 11 Atl. 137; New Bedford & F. S. R. Co. v. Achushnet S. R. Co., 143 Mass. 200, 9 N. E. 536; Board of Com'rs of Socorro County v. Leavitt, 4 N. M. (Gild.) 37, 12 Pac. 759; Moran v. Long Island City, 101 N. Y. 439, 5 N. E. 80; State v. Spaude, 37 Minn. 322, 34 N. W. 164; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615; Smith v. Kernochan, 7 How. (U. S.) 198, 12 L. Ed. 666; Powell v. City of Parkersburg, 28 W. Va. 698; Commissioners of King County v. Davies, 1 Wash. 290, 24 Pac. 540.

<sup>18</sup> In East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 534, 13 L. Ed. 528, Woodbury, J., said: “\* \* \* One of the highest attributes of a Legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently upon other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency. It is bound, also, to continue to regulate such public matters and bodies as much as to organize them at first.

<sup>19</sup> People v. Albertson, 55 N. Y. 50.

<sup>20</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>21</sup> STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E.

trine is as stated by the Supreme Court of Massachusetts:<sup>22</sup> "We cannot declare an act of the Legislature invalid because it abridges the privileges of self-government in a particular in regard to which such privilege is not guaranteed by the provisions of the Constitution." And Mr. Justice Field, touching the dissolution of the municipality of Memphis,<sup>23</sup> said: "There is no contract between the state and the public that the charter of a city shall not at all times be subject to legislative control. There is no such thing as a vested right held by any individuals in the grant of legislative power to a municipality." And the Supreme Court of Maryland has declared that the recognition of a city charter in the Constitution of the state does not place it beyond legislative control.<sup>24</sup> Nor will this power be impaired by the fact that the existing charter had been continued in force by a new Constitution of the state.<sup>25</sup> And again, in the case of *Girard v. City of Philadelphia*,<sup>26</sup> the Supreme Court of the United States declared this legislative power not to be affected by the fact that by the terms of its charter the city was made the trustee of a generous charity.<sup>27</sup> Even the dissolution of a corporation trustee would not affect the trust, since a court of chancery would either assume its execution, or appoint a new trustee.<sup>28</sup>

<sup>22</sup> 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4; *City of Evansville v. State ex rel. Blend*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

<sup>23</sup> *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

<sup>24</sup> *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

<sup>25</sup> *Mayor, etc., of Baltimore v. State ex rel. Board of Police of City of Baltimore*, 15 Md. 376, 74 Am. Dec. 572.

<sup>26</sup> *Wiley v. Corporation of Bluffton*, 111 Ind. 152, 12 N. E. 165.

<sup>27</sup> 7 Wall. 1, 19 L. Ed. 53.

<sup>28</sup> The courts, have likewise sustained similar devices for municipal charities by McDonogh for the poor of New Orleans and Baltimore (*McDonogh v. Murdoch*, 15 How. [U. S.] 367, 14 L. Ed. 732); by McMicken for public education in Cincinnati (*Perin v. Carey*, 24 How. [U. S.] 465, 16 L. Ed. 701); and by Mullanphy for immigrants and travelers in St. Louis (*Chambers v. City of St. Louis*, 29 Mo. 543).

<sup>29</sup> *City of Philadelphia v. Fox*, 64 Pa. 169; *Smith v. Westcott*, 17 R. I. 366, 22 Atl. 280, 13 L. R. A. 217; *Girard v. Philadelphia*, 7

In the case of self-chartered cities the statutes usually provide specifically the method in which the charter may be amended.<sup>29</sup>

#### *Repeal of Charter*

It is not the purpose here to consider the effect of repeal, but only the power and method thereof. We have seen that a municipal charter is not a contract, but merely a sovereign act of legislation, and therefore it is not preserved or protected by the contract clause of the federal Constitution.<sup>30</sup> In the exercise of its inherent sovereign power, the legislature may not only enact, but repeal, laws, in its discretion. A special charter is only a special law, and is therefore subject to repeal in such manner as the legislature may choose to proceed.<sup>31</sup> A municipal corporation organized under general incorporation laws becomes thereby only an agency of the government for more efficient local administration, and this agency may be revoked at any time by the state, as principal.<sup>32</sup> The property rights of the citizens, or of such creditors as there may be upon such repeal, is considered elsewhere. At present, we have to do only with the power of revocation. This power the state undoubtedly possesses, and it may terminate the agency at its pleasure by repeal of the charter which created the agency, whether this charter is under special or general law, for both are subject to repeal.<sup>33</sup>

Wall. (U. S.) 1, 19 L. Ed. 53; *Luehrman v. Taxing Dist. of Shelby, 2 Lea (Tenn.) 425.*

<sup>29</sup> *Wolfe v. City of Moorehead*, 98 Minn. 113, 107 N. W. 728.

<sup>30</sup> *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

<sup>31</sup> *Sloan v. State*, 8 Blackf. (Ind.) 361.

<sup>32</sup> *Girard v. Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53; *Cobb v. Kingman*, 15 Mass. 197; *BERLIN v. GORHAM*, 34 N. H. 266, *Cooley, Cas. Mun. Corp.* 15; *Town of Granby v. Thurston*, 23 Conn. 416; *People v. Tweed*, 63 N. Y. 202; *Crook v. People ex rel. Jayne*, 106 Ill. 237; *Scovill v. City of Cleveland*, 1 Ohio St. 126; *Smith v. Village of Adrian*, 1 Mich. 495; *Lynch v. Lafland*, 4 Cold. (Tenn.) 96; *Boyd v. Chambers*, 78 Ky. 140.

<sup>33</sup> *Jones v. Pensacola*, Fed. Cas. No. 7,488; *State v. Jennings*, 27 Ark. 419; *Town of Montpelier v. Town of East Montpelier*, 29 Vt.

*Same—Method of Repeal*

Legal learning upon the subject of repeal of statutes is vast, varied, and confusing. It is easy to see how a special statute may be repealed by another special statute, and also how a general statute may be repealed by another general statute. Little difficulty arises from such appropriate and express legislation, but the subject of repeal of a general statute by a special one, and a special statute by a general one, has been a prolific source of legal disputation and judicial consideration. It has furnished a fine field for the excursions of legal authors, and the amount of learning upon this subject of repeal of statutes in these matters is so great as to be embarrassing. A detailed examination of the rules and cases upon this subject cannot be made within the prescribed limits of this work. It must suffice to say that the fundamental doctrines of the law upon this subject are generally applicable to the repeal of charters of municipal corporations. These numerous cases and rules seem, for the most part, to be special instances under the particular application of the general doctrine of repeal by implication. If the subsequent statute plainly manifests the unmistakable intention of the Legislature that the provisions of the former statute shall no longer be in operation, then the repeal is effected; otherwise the former statute generally remains in operation, even though the two statutes may not be harmonious.<sup>34</sup> A special charter may thus be repealed not only by a special act, but also by a general act of legislation declaring that all municipal charters, or all of a certain class, including the one in question, are repealed, or enacting that the corporations are or shall be dissolved.<sup>35</sup> However, as stat-

12, 67 Am. Dec. 748; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *City of Ensley v. Simpson*, 166 Ala. 366, 52 South. 61.

<sup>34</sup> *Mayor, etc., of Montezuma v. Minor*, 70 Ga. 191; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Village of St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; *Gorum v. Mills*, 34 N. J. Law, 177.

<sup>35</sup> *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Crook v. People ex rel. Jayne*, 106 Ill. 237; *Wallace v. Board of Trustees of*

utes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities,<sup>36</sup> the passage of a general law relating to the incorporation of cities does not, in the absence of a special provision, repeal the charters of cities theretofore organized under special acts.<sup>37</sup>

How the charter of a municipal corporation organized under general law may be practically repealed is an interesting matter of inquiry, and has been the subject of much judicial consideration. It has been urged that such a charter, being the result of the exercise of ministerial power, is not a proper subject for legislative repeal, and that the repeal of the general law under which it was organized will not affect the status of the municipality as a corporate body endowed with all necessary powers and functions.<sup>38</sup> But this contention is based upon a misconception of the nature of a municipal corporation, and the sovereign legislative power of the state. Of course, where the Constitution forbids, the Legislature may not pass any special statute affecting a municipal corporation, and therefore it may not repeal any charter by a special act. But in the absence of any such constitutional inhibition, the Legislature, exercising the plenary legislative power of the state, may repeal any municipal charter by any recognized mode of legislation.<sup>39</sup> By a single act it may repeal a single

Sharon Tp., 84 N. C. 164; Daniel v. Mayor, etc., of City of Memphis, 11 Humph. (Tenn.) 582; State ex rel. Waring v. Mayor, etc., of Mobile, 24 Ala. 701; People v. Morris, 13 Wend. (N. Y.) 325; Worthley v. Steen, 43 N. J. Law, 542; Sloan v. State, 8 Blackf. (Ind.) 361.

<sup>36</sup> Commonwealth v. Summerville, 204 Pa. 300, 54 Atl. 27.

<sup>37</sup> Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447; Garrett v. Aby, 47 La. Ann. 618, 17 South. 238; Vacation of Henry St., 123 Pa. 346, 16 Atl. 785.

<sup>38</sup> This assumes that the ministerial structure may outlive its legislative foundation—may stand after the substructure is removed. Such a postulate would equally well preserve a municipality after repeal of its special charter, which is impossible. Sloan v. State, 8 Blackf. (Ind.) 361.

<sup>39</sup> Bloomer v. Stolley, 5 McLean, 158, Fed. Cas. No. 1,559; United States v. Port of Mobile (C. C.) 12 Fed. 768, note; Cooley, Const. Lim. (6th Ed.) c. 5, p. 147.

municipal charter, or the municipal charters of a certain class of corporations, or all charters of all the municipal corporations within the state. Moreover, the Legislature may not only repeal the general incorporation act under which municipal corporations have been organized, but, unless forbidden by the Constitution, it may by appropriate legislation, in effect, repeal the charter of any municipal corporation organized and existing under the general law. This is only to repeat that the Legislature, representing the power of the state, may, by special legislation, when not forbidden by the Constitution, recall the governmental powers and authority with which it has endowed a municipal corporation as an agency of the state, in any manner whatsoever.<sup>40</sup> As the form of the grant of power—that is, the giving of the charter—was not material, so the form of revocation of such power is not material. So a charter under a general incorporation act may be repealed by a special public law enacted for that particular purpose, as well as by a general statute, or by a constitutional provision necessarily repugnant to, and irreconcilable with, the previous law.<sup>41</sup>

<sup>40</sup> Luehrman v. Taxing Dist. of Shelby, 2 Lea (Tenn.) 425; People v. Morris, 13 Wend. (N. Y.) 325; City of Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 495; Buford v. State, 72 Tex. 182, 10 S. W. 401; State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance, 55 Mo. 378.

<sup>41</sup> Mayor, etc., of City of Griffin v. Inman, 57 Ga. 370; Bond v. Hiestand, 20 La. Ann. 139; Hammond v. Haines, 25 Md. 541, 90 Am. Dec. 77; State v. Wilson, 12 Lea (Tenn.) 246; State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance, 55 Mo. 378; Union Pac. Ry. Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098.

## CHAPTER VI

### PROCEEDINGS AND ORDINANCES

45. The Governing Body.
46. Mode of Action.
47. Meetings.
48. Corporate Records.
49. Ordinances.
50. Same—Mode of Enactment.
51. Essentials of Valid Ordinance.
52. Fines and Penalties.
53. Procedure.

### THE GOVERNING BODY

45. The corporate affairs of the municipality are managed by a governing body, called generally the common council. It is the general agent of the corporation for all purposes, and exercises all the corporate powers, not expressly committed by law to other boards or officers.

In every municipality, whether created under general or special law, there is, and necessarily must be, a body or board constituted and empowered to exercise the powers delegated to the corporation by the state, and having immediate control and management of the affairs of the corporation. This governing body is generally known as the common council,<sup>1</sup> though in some classes of municipalities it is called the board of trustees,<sup>2</sup> and in others the board of selectmen.<sup>3</sup> But by whatever name known this body is the general agent of the corporation, and exercises all the corporate powers not committed by law

<sup>1</sup> Mayor, etc., of Baltimore v. Poultney, 25 Md. 18; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774.

<sup>2</sup> Mintzer v. Schilling, 117 Cal. 361, 49 Pac. 209.

<sup>3</sup> McFarland v. Gordon, 70 Vt. 455, 41 Atl. 507.

to other boards or officers.<sup>4</sup> It is composed of members called aldermen, assemblymen, trustees, or selectmen, as the case may be, who are chosen by the electors of the corporation in the manner prescribed by the charter or by general law.

Generally this body is composed of a single chamber, but in some cities a bicameral system is in vogue.<sup>5</sup>

#### *Mayor as Member of Council*

The mayor or chief executive of the municipality is generally a member of the council and presides over it ex officio.<sup>6</sup> But in many municipalities, especially the larger cities, the mayor is not a member of the council,<sup>7</sup> and the presiding officer is another person, either chosen by the members of the council from their own number or elected by the voters of the corporation to that special office.<sup>8</sup>

The mayor's functions, in so far as they are connected with the proceedings of the council, are usually prescribed in the charter, and differ in various municipalities. In some of them, as the executive head of the corporation, he possesses the veto power.<sup>9</sup> In some, as the presiding officer, he has power to cast only the deciding vote in case of tie;<sup>10</sup> in oth-

<sup>4</sup> Moore v. Mayor, etc., of City of New York, 73 N. Y. 238, 29 Am. Rep. 134; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774.

<sup>5</sup> The council is composed of a single chamber in Chicago, Detroit, New York, San Francisco, and Indianapolis. In Buffalo, Philadelphia, St. Paul, Baltimore, and some other large cities there are two chambers.

<sup>6</sup> City of Raleigh v. Sorrell, 46 N. C. 49; Price v. Beale, 5 Pa. Co. Ct. R. 491; People ex rel. Funk v. Wright, 30 Colo. 439, 71 Pac. 365; Griffin v. Messenger, 114 Iowa, 99, 86 N. W. 219; People v. Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. Rep. 498.

<sup>7</sup> Jacobs v. Board of Sup'rs of City and County of San Francisco, 100 Cal. 121, 34 Pac. 630; Cochran v. McCleary, 22 Iowa, 75; Zane v. Rosenberry, 153 Pa. 38, 25 Atl. 1086.

<sup>8</sup> State v. Kiichli, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; Commonwealth v. Angle, 14 Pa. Co. Ct. R. 538.

<sup>9</sup> Elliott, Mun. Corp. § 208. A city cannot by ordinance confer a greater power upon its mayor than that given by charter. Union Depot & R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329.

<sup>10</sup> LAWRENCE v. INGERSOLL, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870, Cooley, Cas. Mun. Corp. 149; Peo-

ers, his functions and duties are the same as those of any other member of the board.<sup>11</sup> The old common-law rule that the mayor was an integral part of a municipal corporation, and his presence necessary to a valid corporate meeting, does not prevail in America.<sup>12</sup> When he is absent from the city his office may be supplied by a pro tem. election from among the members of the board, and the person thus chosen mayor pro tem. has the powers and may perform the functions of the mayor for the time being.<sup>13</sup>

#### *De Facto Council*

A council composed of de facto members in whole or in part may lawfully transact the corporate business.<sup>14</sup> It is, of

ple v. Rector, etc., of Church of the Atonement, 48 Barb. (N. Y.) 603; Launtz v. People ex rel. Sullivan, 113 Ill. 137, 55 Am. Rep. 405; People ex rel. Funk v. Wright, 30 Colo. 439, 71 Pac. 365; Harris v. People ex rel. Squires, 18 Colo. App. 160, 70 Pac. 699; People ex rel. Argus Co. v. Bresler, 171 N. Y. 302, 63 N. E. 1093; Cate v. Martin, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613; City of Somerset v. Smith, 105 Ky. 678, 49 S. W. 456; State ex rel. Young v. Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205; Hecht v. Coale, 93 Md. 692, 49 Atl. 660; Bousquet v. State, 78 Miss. 478, 29 South. 399; Ott v. State ex rel. Lowery, 78 Miss. 487, 29 South. 520; State ex rel. Nelson v. Mott, 111 Wis. 19, 86 N. W. 569.

<sup>11</sup> 1 Dill. Mun. Corp. § 270.

<sup>12</sup> Martindale v. Palmer, 52 Ind. 411.

<sup>13</sup> Commonwealth v. Corcoran, 9 Kulp (Pa.) 507; People v. Blair, 82 Ill. App. 570 (affirmed in 181 Ill. 460, 54 N. E. 1024), where it was held that if the mayor is in the city, but is absent from the meeting, either by reason of illness, executive business in another part of the city, or by choice, the power of the council is confined to the appointment of a temporary president or chairman, who will possess the authority of presiding officer only, and not that of mayor.

<sup>14</sup> Trustees of Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Town of Decorah v. Bullis, 25 Iowa, 12; Koontz v. Burgess, etc., of Hancock, 64 Md. 134, 20 Atl. 1039; Williams v. Inhabitants of School Dist. No. 1, in Lunenburg, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Cochran v. McCleary, 22 Iowa, 75; Scovill v. Cleveland, 1 Ohio St. 126; Pritchett v. People, to use of Docker, 1 Gilman (Ill.) 529; Lockhart v. City of Troy, 48 Ala. 579; Laver v. McGlachlin, 28 Wis. 364; Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011; Kirker v. Cincinnati, 48 Ohio St. 507, 27 N. E. 898; Ensley v. Mayor, etc., of City of Nashville, 2 Baxt. (Tenn.) 144; ROCHE v. JONES, 87 Va. 484, 12 S. E. 965, Cooley, Cas. Mun. Corp. 114; Dean v. Gleason,

course, essential that there should be de jure offices.<sup>16</sup> No corporate business can be transacted except by a body created by law and organized thereunder.<sup>16</sup> If, therefore, under a mistaken supposition that a new general statute providing for a new governing body applies to a certain corporation, such new body is elected and organized, and proceeds to transact the corporate business in lieu of the lawful body, its acts are void.<sup>17</sup> They lack the essentials of valid law establishing de jure offices in the corporation to give them a de facto standing. But when there is a de jure council or governing body, the persons actually composing it and transacting its business constitute a de facto organization whose transactions are valid and binding.<sup>18</sup> A conflict between two rival bodies claiming

16 Wis. 1; *State v. Goowin*, 69 Tex. 55, 5 S. W. 678; *Dugan v. Farrier*, 47 N. J. Law, 383, 1 Atl. 751; *Butler v. Walker*, 98 Ala. 358, 13 South. 261, 39 Am. St. Rep. 61; *State v. Gray*, 23 Neb. 365, 36 N. W. 577; *Stuart v. Inhabitants of Ellsworth*, 105 Me. 523, 75 Atl. 59; *Warner v. Coatesville Borough*, 231 Pa. 141, 80 Atl. 576.

16 *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 130, Fed. Cas. No. 17,372; *Town of Decorah v. Bullis*, 25 Iowa, 12; *Hildreth's Heirs v. McIntire's Devisee*, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61. But see *ROCHE v. JONES*, 87 Va. 484, 12 S. E. 965, Cooley, Cas. Mun. Corp. 114.

16 *Dabney v. Hudson*, 68 Miss. 292, 8 South. 545, 24 Am. St. Rep. 276; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289.

17 *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *People ex rel. Hoffman v. Hecht*, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96. But see *ROCHE v. JONES*, 87 Va. 484, 12 S. E. 965, Cooley, Cas. Mun. Corp. 114.

18 *Trustees of Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; *Carland v. Custer County*, 5 Mont. 579, 6 Pac. 24; *ROCHE v. JONES*, 87 Va. 484, 12 S. E. 965, Cooley, Cas. Mun. Corp. 114; *State ex rel. Newman v. Jacobs*, 17 Ohio, 143; *State v. Goowin*, 69 Tex. 55, 5 S. W. 678; *Jewell v. Gilbert*, 64 N. H. 13, 5 Atl. 80, 10 Am. St. Rep. 357; *Dean v. Gleason*, 16 Wis. 1; *Ensley v. Mayor, etc., of City of Nashville*, 2 Baxt. (Tenn.) 144; *Kirker v. Cincinnati*, 48 Ohio St. 507, 27 N. E. 898; *Butler v. Walker*, 98 Ala. 358, 13 South. 261, 39 Am. St. Rep. 61; *State v. Gray*, 23 Neb. 365, 36 N. W. 577.

Where one is appointed clerk of the common council by the vote of an alderman de facto, but not de jure, such appointment is valid,

the corporate powers is properly the subject of adjudication in a quo warranto proceeding;<sup>19</sup> but it has been held that persons unlawfully claiming to exercise the powers of municipal corporations may properly be enjoined in a chancery proceeding brought by lawful claimants of the offices.<sup>20</sup>

### MODE OF ACTION

**46.** Where the method of exercising the corporate powers is prescribed by the charter or by general law, such method must be pursued in order that the acts of the council shall be valid. If no mode is prescribed, the council may exercise the power in any appropriate method.

It has been pointed out heretofore that a municipal corporation possesses only such powers as are granted in express words or those necessarily incident to or implied in those expressly granted.<sup>21</sup> If the method of exercising the powers conferred by charter or statute is prescribed, that method must be followed in order to give validity to the acts of the council.<sup>22</sup>

Consequently, if the charter or general law provides that certain powers can be exercised only by ordinance, that method must be pursued, and an attempt to act under the power by resolution will be ineffective.<sup>23</sup> Thus it is generally held

though the alderman be afterwards ousted by quo warranto. People v. Stevens, 5 Hill (N. Y.) 616.

<sup>19</sup> 1 Dill. Mun. Corp. §§ 202, 204. See Frey v. Michie, 68 Mich. 323, 36 N. W. 184; Cochran v. McCleary, 22 Iowa, 75.

<sup>20</sup> Kerr v. Trego, 47 Pa. 292. But see In re Sawyer, 124 U. S. 212, 8 Sup. Ct. 482, 31 L. Ed. 402.

<sup>21</sup> See ante, § 40.

<sup>22</sup> City of Nevada, to Use of Gilfillan, v. Eddy, 123 Mo. 546, 27 S. W. 471; Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; City of Terre Haute v. Lake, 43 Ind. 480. See, also, ante, § 41.

<sup>23</sup> City of Cape Girardeau v. Fougeu, 30 Mo. App. 551; Mayor, etc., of City of Paterson v. Barnet, 46 N. J. Law, 62; Mills v. City of San Antonio (Tex. Civ. App.) 65 S. W. 1121. See, also, City of

that the compensation of city officers must be fixed by ordinance.<sup>24</sup> And the council cannot by resolution abolish an office created by ordinance.<sup>25</sup>

On the other hand, when the council is vested with full power over the subject, and no particular method for the exercise of the power is specified, the city authorities may exercise it in any way that is most convenient, and may act by resolution or other appropriate manner, and their action will be valid and as effectual as it would be by ordinance for the same purpose.<sup>26</sup>

#### *Functions Discretionary and Ministerial*

Moreover, it should also be remembered that corporate proceedings cannot be conducted by individual aldermen, nor even by the mayor.<sup>27</sup> There must be a meeting for deliberation, consultation, and corporate action.<sup>28</sup> Nor can any public powers or matters of discretion be delegated by the council to others.<sup>29</sup> They must perform in person the discretionary and

Brazil v. McBride, 69 Ind. 244. Distinction between ordinance and resolution, see post, § 49.

<sup>24</sup> City of Central v. Sears, 2 Colo. 588; Smith v. Commonwealth ex rel. Dillon, 41 Pa. 335. And see Brand v. City of San Antonio (Tex. Civ. App.) 37 S. W. 340.

<sup>25</sup> City of San Antonio v. Micklejohn, 89 Tex. 79, 33 S. W. 735.

<sup>26</sup> CITY OF CRAWFORDSVILLE v. BRADEN, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214, Cooley, Cas. Mun. Corp. 100; McGavock v. City of Omaha, 40 Neb. 64, 58 N. W. 543; Brady v. City of Bayonne, 57 N. J. Law, 379, 30 Atl. 968; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835; City of Chicago v. McKechniey, 91 Ill. App. 442; Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; State ex rel. City of Carthage v. Cowgill & Hill Mill Co., 156 Mo. 620, 57 S. W. 1008.

<sup>27</sup> McCortle v. Bates, 29 Ohio St. 419, 23 Am. Rep. 758; Strong v. Dist. of Columbia, 4 Mackey (D. C.) 242; Day v. Green, 4 Cush. (Mass.) 433; City of East St. Louis v. Wehrung, 50 Ill. 28.

<sup>28</sup> Commonwealth v. Howard, 149 Pa. 302, 24 Atl. 308; City of Little Rock v. Board of Improvements, 42 Ark. 152; Deichsel v. Town of Maine, 81 Wis. 553, 51 N. W. 880; People v. Stowell, 9 Abb. N. C. (N. Y.) 456; Dey v. Mayor, etc., of Jersey City, 19 N. J. Eq. 412; City of Baltimore v. Poultney, 25 Md. 18.

<sup>29</sup> City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; In re WILSON, 32 Minn. 145, 19 N. W. 723, Cooley, Cas.

public duties imposed upon them.<sup>30</sup> Purely ministerial and executive functions may be, often must be, committed to others for performance.<sup>31</sup>

Mun. Corp. 116, 349; Minneapolis Gaslight Co. v. City of Minneapolis, 36 Minn. 159, 30 N. W. 450; JEWELL BELTING CO. v. VILLAGE OF BERTHA, 91 Minn. 9, 97 N. W. 424, Cooley, Cas. Mun. Corp. 168; Hydes v. Joyes, 4 Bush (Ky.) 464, 96 Am. Dec. 311; State v. Mayor, etc., of Jersey City, 25 N. J. Law, 309; City of Indianapolis v. Indianapolis Gas Light & Coke Co., 66 Ind. 396; Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; Johnston v. Mayor, etc., of City of Macon, 62 Ga. 645; McCowell v. City of Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653. In Whyte v. Mayor, etc., of Town of Nashville, 2 Swan (Tenn.) 364, a case of sidewalk assessment, it was held that a municipal corporation cannot delegate powers conferred upon and to be exercised by it to a street committee. See Tomlin v. City of Cape May, 63 N. J. Law, 429, 44 Atl. 209.

<sup>30</sup> City of Kankakee v. Potter, 119 Ill. 324, 10 N. E. 212; Perine Contracting & Paving Co. v. City of Pasadena, 116 Cal. 6, 47 Pac. 777; Hunt v. City of Boonville, 65 Mo. 620, 27 Am. Rep. 299; Thompson v. Schermerhorn, *supra*; Birdsall v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Naegle v. City of Centralia, 81 Ill. App. 334; Matthews v. City of Alexandria, 68 Mo. 115, 30 Am. Rep. 776. But where special authority to delegate this power by the legislature is given, such delegation is valid. Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659. See, also, Lord v. City of Oconto, 47 Wis. 386, 2 N. W. 785; Davis v. Read, 65 N. Y. 566; Ould v. City of Richmond, 64 Va. 464, 14 Am. Rep. 139; Phelps v. Mayor, etc., of New York, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626.

<sup>31</sup> Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666; Bullock County v. Washer, 130 U. S. 142, 9 Sup. Ct. 499, 32 L. Ed. 885; Bissell v. Jeffersonville, 24 How. 287, 16 L. Ed. 664; Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; Damon v. Inhabitants of Granby, 2 Pick. (Mass.) 345; Gregory v. City of Bridgeport, 41 Conn. 76, 19 Am. Rep. 458, where, power being expressly granted to "ordain by-laws relating to wharves," and a general authority to appoint necessary officers to carry by-laws into effect, an ordinance which appointed a superintendent of wharves, and empowered him to regulate the mooring of vessels, was held to be valid. See, also, Gilmore v. City of Utica, 131 N. Y. 26, 29 N. E. 841; Holland v. State ex rel. Duval County, 23 Fla. 123, 1 South. 521; City of Alton v. Mulledy, 21 Ill. 76; State ex rel. City of Columbus v. Hauser, 63 Ind. 155; Collins v. Holyoke, 146 Mass. 298, 15 N. E. 908; Main v. Ft. Smith, 49 Ark. 480, 5 S. W. 801; Kramrath v. City of Albany, 53 Hun, 206, 6 N. Y. Supp. 54; Commonwealth v. City of Pittsburgh, 14 Pa. 177; Dorey v. Boston, 146 Mass. 336, 15 N. E. 897; City of Burlington v. Dennison, 42 N. J. Law, 165.

## MEETINGS

47. The corporate affairs of a municipality must be transacted at a corporate meeting of the members of the governing body, duly convened at the stated or notified time and place, a quorum being present, and a majority thereof expressly favoring the action taken.

As pointed out in the preceding section, corporate affairs cannot be conducted by individual members of the council, but there must be meetings for deliberation, consultation, and corporate action. Meetings are of two kinds, stated or regular, and called or special; the stated meeting being fixed in time and place by charter, ordinance, or usage, and the called meeting, one specially convened in emergency. The time and place of a stated meeting of the council may be fixed by the charter, ordinance, or otherwise.<sup>32</sup> But, even where the charter provides that the council shall meet at such time and place as they by resolution may direct, such provision is not prohibitory, and will not prevent a valid special meeting being held at other times and places.<sup>33</sup> It is usually provided that such special meetings may be called by the mayor or by a certain number of the aldermen whenever necessity therefor may arise.<sup>34</sup>

<sup>32</sup> North v. Cary, 4 Thomp. & C. (N. Y.) 357; Shugars v. Hamilton, 122 Ky. 606, 92 S. W. 564; State v. Kantler, 33 Minn. 69, 21 N. W. 856, holding that in the absence of other provisions fixing the time of holding stated meetings the council may fix the time by motion.

<sup>33</sup> State ex rel. Parker v. Smith, 22 Minn. 218.

<sup>34</sup> MAGNEAU v. CITY OF FREMONT, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436, Cooley, Cas. Mun. Corp. 119; Sommercamp v. Kelley, 8 Idaho, 712, 71 Pac. 147; Moore v. Perry, 119 Iowa, 423, 93 N. W. 510; McGrath v. City of Newton, 29 Kan. 364 (holding that meeting may be called by acting mayor); City of Auburn v. Union Water Power Co., 90 Me. 71, 37 Atl. 335.

*Notice*

Of a stated meeting every member has due notice by the statute, rule, or usage under which it is held;<sup>35</sup> but of the called meeting reasonable notice of the time and place is required to be given, if practicable, to every member of the governing body.<sup>36</sup> If extraordinary business is to be transacted, then notice must also be given of its nature, but not so of ordinary municipal affairs.<sup>37</sup> Actual presence of a member not protesting at a called meeting is equivalent to notice.<sup>38</sup> All members must be present or notified to make a valid special meeting.<sup>39</sup> The notice must be personally served,<sup>40</sup> if practicable, upon every member of the governing body, excepting only those who are absent from the state or whose whereabouts is unknown.<sup>41</sup> Unnotified members who are actually present may avoid the presumption of notification by protesting against the meeting for want of notice.<sup>42</sup>

*Adjourned Meeting*

A valid stated or called meeting has the implied corporate power to adjourn to a future day and then resume its busi-

<sup>35</sup> Fitzgerald v. Pawtucket St. Ry. Co., 24 R. I. 201, 52 Atl. 887; Willc. Mun. Corp. § 59.

<sup>36</sup> Lord v. City of Anoka, 36 Minn. 176, 30 N. W. 550; Shugars v. Hamilton, 122 Ky. 606, 92 S. W. 564. But see Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717.

<sup>37</sup> Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666; Richardson v. City of Omaha, 74 Neb. 297, 104 N. W. 172; Mills v. City of San Antonio (Tex. Civ. App.) 65 S. W. 1121.

<sup>38</sup> Lord v. City of Anoka, 36 Minn. 176, 30 N. W. 550; Turner v. Hutchinson, 113 Mich. 245, 71 N. W. 514; Ryan v. Mayor, etc., of City of Tuscaloosa, 155 Ala. 479, 46 South. 638.

<sup>39</sup> Moore v. Perry, 119 Iowa, 423, 93 N. W. 510; State ex rel. Parker v. Smith, 22 Minn. 218; MAGNEAU v. CITY OF FREMONT, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436, Coolley, Cas. Mun. Corp. 119; Shaw v. Jones, 6 Ohio Dec. 453, 4 Ohio N. P. 372; Schofield v. Village of Tampico, 98 Ill. App. 324.

<sup>40</sup> Lord v. City of Anoka, 36 Minn. 176, 30 N. W. 550; People v. Batchelor, 22 N. Y. 128.

<sup>41</sup> City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; State ex rel. Harty v. Kirk, 46 Conn. 395; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717.

<sup>42</sup> Lord v. Anoka, 36 Minn. 176, 30 N. W. 550. Cf. Mitchell County Sup'r's v. Horton, 75 Iowa, 271, 39 N. W. 394.

ness.<sup>43</sup> This adjourned meeting is merely a continuation of the original meeting, and notice is not required for it.<sup>44</sup> At such meeting any business may be transacted which could properly have come before the board at the original meeting, and the mode of proceeding at such meeting is the same as that in the original meeting.<sup>45</sup>

#### *Quorum*

A majority of the body constitute a quorum, unless it is otherwise provided by law.<sup>46</sup> A quorum is competent to

<sup>43</sup> *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *People v. Batchelor*, 22 N. Y. 128; *Warner v. Mower*, 11 Vt. 385.

As to appointment of a presiding officer pro tempore, see *Keith v. City of Covington*, 109 Ky. 781, 60 S. W. 709, 22 Ky. Law Rep. 1414. See, also, *People ex rel. Lewis v. Brush*, 83 Hun, 613, 31 N. Y. Supp. 586; *Truman v. Board of Supervisors of City and County of San Francisco*, 110 Cal. 128, 42 Pac. 421; *Saleño v. City of Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367.

<sup>44</sup> *State ex rel. Parker v. Smith*, 22 Minn. 218; *Chosen Freeholders of Hudson County v. State*, 24 N. J. Law, 718; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660. A meeting of a city council, at which less than a quorum was present, adjourned to a future day, at which time another adjournment was had. Held that, though the first adjournment was irregular because of the absence of a quorum, it would be presumed that a quorum was present at the second meeting, and that a regular adjournment was then had. *Moore v. Perry*, 119 Iowa, 423, 93 N. W. 510.

<sup>45</sup> *State ex rel. Parker v. Smith*, 22 Minn. 218; *Borough of Avoca v. Pittston, J. & A. St. Ry. Co.*, 7 Kulp (Pa.) 470; *MAGNEAU v. CITY OF FREMONT*, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436, *Cooley, Cas. Mun. Corp.* 119; *Stiles v. City of Lamberville*, 73 N. J. Law, 90, 62 Atl. 288.

<sup>46</sup> *Heiskell v. Mayor and City Council of Baltimore*, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308; *Barneit v. Paterson*, 48 N. J. Law, 395, 6 Atl. 15; *City of Benwood v. Wheeling Ry. Co.*, 53 W. Va. 465, 44 S. E. 271; *Williams v. Brace*, 5 Conn. 190. But where the council consists of six members, with the mayor as presiding officer, the mayor and three of the councilmen do not constitute a quorum, and their acts are void. *City of Somerset v. Somerset Banking Co.*, 109 Ky. 549, 60 S. W. 5, 22 Ky. Law Rep. 1129. See *State ex rel. City of Carthage v. Cowgill & Hill Milling Co.*, 156 Mo. 620, 57 S. W. 1008. As the mayor, though a member of the council, is entitled to vote only in case of a tie, he cannot be counted as a member to make a quorum. *McLean v. City of East St. Louis*, 222 Ill. 510, 78 N. E. 815.

transact corporate business,<sup>47</sup> and a majority of such quorum is sufficient to take any lawful action, or make an election,<sup>48</sup> unless the law governing the corporation requires a greater number.<sup>49</sup> Thus, if the body be composed of nine, then five make a lawful meeting and three of these may pass any ordinance or resolution, or commit the corporation to legal obligation.<sup>50</sup>

If the governing body is composed of two parts, these rules will apply to each separate part.

#### *Mode of Proceeding*

When a corporate meeting is duly convened and organized, its mode of procedure, wherein not otherwise expressly prescribed by statute, charter, or by-law, is in accordance with the general rules governing parliamentary bodies in America.<sup>51</sup> The ayes and noes may be called upon any vote not taken by ballot;<sup>52</sup> the presence of a quorum is necessary at every vote of the council;<sup>53</sup> no measure can be carried except by af-

<sup>47</sup> Mueller v. Egg Harbor City, 55 N. J. Law, 245, 26 Atl. 89; Labourdette v. First Municipality of New Orleans, 2 La. Ann. 527; Hutchinson v. Borough of Belmar, 61 N. J. Law, 443, 39 Atl. 643.

<sup>48</sup> Wheeler v. Commonwealth, 98 Ky. 59, 32 S. W. 259; Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637; Cadmus v. Farr, 47 N. J. Law, 208. Some cases rule that assent of a majority will be presumed. See Collopy v. Cloherty (Ky.) 39 S. W. 431.

<sup>49</sup> State v. Dickie, 47 Iowa, 629; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; Blood v. Beal, 100 Me. 30, 60 Atl. 427; Wood v. Gordon, 58 W. Va. 321, 52 S. E. 261.

<sup>50</sup> But if the body consist of twelve councilmen, seven is a quorum, and four may pass an act. See Wheeler v. Commonwealth, 98 Ky. 59, 32 S. W. 259.

<sup>51</sup> 1 Dill. Mun. Corp. § 288.

<sup>52</sup> Hicks v. Long Branch Commissioner, 69 N. J. Law, 300, 54 Atl. 568, 55 Atl. 250.

<sup>53</sup> State ex rel. Walden v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; City of Oakland v. Carpentier, 13 Cal. 540; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Brown v. District of Columbia, 127 U. S. 579, 8 Sup. Ct. 1314, 32 L. Ed. 262; City of Baltimore v. Poultney, 25 Md. 18; Dey v. Mayor, etc., of Jersey City, 19 N. J. Eq. 412; Ferguson v. Chittenden County, 6 Ark. 479; Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; Barnert v. Paterson, 48 N. J. Law, 395,

firmative vote of a majority of all present;<sup>54</sup> action taken may be rescinded at any time before the rights of third parties have vested thereunder;<sup>55</sup> the board may rely and take action upon reports of its committees without further investigation;<sup>56</sup> and generally such course of procedure may be followed as is proper in legislative bodies under parliamentary law.<sup>57</sup>

It is to be understood, of course, that the proceedings of a municipal corporation are the proper subject of statutory regulation, and in many cases also of municipal ordinance. Usually, indeed, the charter prescribes the governing body, the qualifications and functions of its members, the powers of the mayor, the time and place of the meetings, the quorum, and the other matters treated of in this section. In such cases these regulations by statute, charter, and ordinance are controlling; and whenever they are mandatory they must be pursued in order to give validity to the proceedings.<sup>58</sup>

6 Atl. 15; *Heiskell v. Mayor and City Council of Baltimore*, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

<sup>54</sup> *Labourdette v. First Municipality of New Orleans*, 2 La. Ann. 527; 1 Dill. Mun. Corp. § 282; *LAWRENCE v. INGERSOLL*, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870, Cooley, Cas. Mun. Corp. 149; *State v. Priester*, 43 Minn. 373, 45 N. W. 712. A resolution of a city council, not adopted by a majority of the whole number of the council, as required by statute, is void. *Cascaden v. City of Waterloo*, 106 Iowa, 673, 77 N. W. 333.

<sup>55</sup> *State ex rel. Rosenheim v. Hoyt*, 2 Or. 246; *Reiff v. Conner*, 10 Ark. 241; *Sank v. City of Philadelphia*, 4 Brewst. (Pa.) 133; *State v. Foster*, 7 N. J. Law, 101; *State ex rel. Coogan v. Barbour*, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65.

<sup>56</sup> *Dorey v. Boston*, 146 Mass. 336, 15 N. E. 897; *Main v. Ft<sup>th</sup> Smith*, 49 Ark. 480, 5 S. W. 801; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Salmon v. Haynes*, 50 N. J. Law, 97, 11 Atl. 151. A municipal council has the absolute right to make and unmake its own committees by a majority vote. *Dreyfus v. Lonergan*, 73 Mo. App. 336.

<sup>57</sup> 1 Dill. Mun. Corp. § 288; Tied. Mun. Corp. § 98. But standing rules of council, and mere rules of parliamentary law, not enjoined by statute, may be abolished, modified, or waived at the will of the council making them. *In re Broad St.*, 9 Kulp (Pa.) 37; *Simmerman v. Borough of Wildwood*, 60 N. J. Law, 367, 40 Atl. 1132; *Whitney v. Village of Hudson*, 69 Mich. 189, 37 N. W. 184.

<sup>58</sup> See ante, § 41.

## CORPORATE RECORDS

48. Minutes of the proceedings at a meeting of the council duly recorded in the books of the municipality are public records, and as such are competent evidence either for or against the corporation, as well as third parties, of the corporate acts and proceedings therein recorded.

It is usually provided in the charter of a municipal corporation or by the general law that a record shall be kept of the proceedings of the common council,<sup>69</sup> though it has been held that the unrecorded acts of the governing body are valid, if clearly proved.<sup>70</sup>

The minutes of council proceedings are usually kept in a record book provided for that purpose, and, having been kept by the clerk or recorder in memoranda during the meeting, are thereafter formally written upon the minute book, and, being read and approved at the ensuing meeting, are authenticated by the signature of the mayor; thereafter they cannot be changed except by the vote of the council.<sup>71</sup> In order to make the record conform to the books, the council, like a court of

<sup>69</sup> City of Louisville v. McKegney, 70 Ky. (7 Bush) 651; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; City of Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503; People ex rel. Cady v. Ihnken, 129 Mich. 466, 89 N. W. 72; Goodyear Rubber Co. v. City of Eureka, 135 Cal. 613, 67 Pac. 1043.

<sup>70</sup> Barton v. City of Pittsburg, 4 Brewst. (Pa.) 373; Borough of Avoca v. Pittston, J. & A. St. Ry. Co., 7 Kulp (Pa.) 470; Village of Belknap v. Miller, 52 Ill. App. 617. A failure of a city to comply with a charter provision that the ordinance shall be recorded does not render the ordinance void, the provision being merely directory. Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532.

<sup>71</sup> 1 Dill. Mun. Corp. § 297; McClain v. McKisson, 15 Ohio Cir. Ct. R. 517, 8 O. C. D. 357. But it has been held in several cases that so long as the records are in the custody of the clerk he may amend them according to his knowledge of the truth. See Mott v. Reynolds, 27 Vt. 206; Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821.

record, may at a subsequent meeting amend its record by a minute entry *nunc pro tunc*.<sup>62</sup> Such correction of minutes can only be made by the body which has transacted the business; a new council cannot amend the record of its predecessor.<sup>63</sup> These minutes thus recorded and authenticated, being made of public affairs, usually have the same probative force and character as other public records.<sup>64</sup>

#### *Evidence Aliunde*

It has been ruled in many cases that this record is not exclusive, but that other competent evidence may be given of corporate proceedings.<sup>65</sup> Such rulings are common in the New England states in regard to records of town meetings; but these cases cannot be regarded as precedents for the municipal record because of the widely different modes of proceeding and the lack of means of corporate authentication. The Supreme Court of the United States has ruled that the acts of a corporation may be proved otherwise than by its records or written documents, even though it was its duty to keep a fair and regular record of its proceedings.<sup>66</sup> The rights of creditors or of third parties are not to be prejudiced by the

<sup>62</sup> Becker v. City of Henderson, 100 Ky. 450, 38 S. W. 857; White v. Town of Clarksville, 75 Ark. 340, 87 S. W. 630; City of Logansport v. Crockett, 64 Ind. 319; City of Anniston v. Davis, 98 Ala. 629, 13 South. 331, 39 Am. St. Rep. 94; Everett v. Deal, 148 Ind. 90, 47 N. E. 219; Pontiac v. Oxford, 49 Mich. 69, 12 N. W. 914; Mayhew v. Gay Head Dist., 13 Allen (Mass.) 129; Commissioners' Court of Lowndes County v. Hearne, 59 Ala. 371; Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821.

<sup>63</sup> City of Covington v. Ludlow, 1 Metc. (Ky.) 295; Howeth v. Mayor, etc., of Jersey City, 30 N. J. Law, 93; Graham v. City of Carondelet, 33 Mo. 262.

<sup>64</sup> Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821; Moore v. Town of Jonesboro, 107 Ga. 704, 33 S. E. 435; City of Pittsburg v. Cluley, 74 Pa. 262; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Taylor v. Henry, 2 Pick. (Mass.) 403; People ex rel. Cady v. Ihnken, 129 Mich. 466, 89 N. W. 72.

<sup>65</sup> State ex rel. Hosford v. Kennedy, 69 Conn. 220, 37 Atl. 503; City of Indianapolis v. Imberry, 17 Ind. 175; Darlington v. Commonwealth, to Use of City of Allegheny, 41 Pa. 68.

<sup>66</sup> Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552

neglect of the council to keep proper minutes.<sup>67</sup> The acts and proceedings of the corporation may be proved by any competent evidence aliunde the record kept by it in cases where corporate obligation and liability are involved.<sup>68</sup> Rigid rules of evidence have often been relaxed on a showing that municipal records have been carelessly and imperfectly kept; and the decisions in regard to varying, altering, and amending such records are not uniform.<sup>69</sup>

### *Inspection*

The right of members of a municipal corporation to inspect the corporate records has been strictly upheld by the courts, and fewer restrictions laid upon it than in case of private corporations.<sup>70</sup> Any inhabitant or taxpayer has been held entitled to inspect the record of the corporate proceedings, and to have a copy thereof on payment of the usual fee.<sup>71</sup> This right has also been extended to the other corporate records, such as treasurer's and comptroller's books of account, tax-books, and voting lists.<sup>72</sup> Other persons also, having an interest under these proceedings or in these accounts, are likewise entitled to inspection and copy.<sup>73</sup>

<sup>67</sup> School Dist. No. 2 v. Clark, 90 Mich. 435, 51 N. W. 529; City of San Antonio v. Lewis, 9 Tex. 69; Bigelow v. Inhabitants of City of Perth Amboy, 25 N. J. Law, 297.

<sup>68</sup> Hutchinson v. Pratt, 11 Vt. 402; Langsdale v. Bonton, 12 Ind. 467. See Barr v. City of New Brunswick, 58 N. J. Law, 255, 83 Atl. 477.

<sup>69</sup> Westerhaven v. Clive, 5 Ohio, 136; Athearn v. Independent Dist. of Millersburg, 33 Iowa, 105; Ross v. City of Madison, 1 Ind. 281, 48 Am. Dec. 361; Trustees of Hazelgreen v. McNabb, 64 S. W. 431, 23 Ky. Law Rep. 811.

<sup>70</sup> 1 Dill. Mun. Corp. § 303.

<sup>71</sup> People ex rel. Bishop v. Walker, 9 Mich. 328.

<sup>72</sup> People v. Cornell, 47 Barb. (N. Y.) 329.

<sup>73</sup> Grant, Corporations, § 311.

## ORDINANCES

49. An ordinance is a by-law of a municipality, enacted by the council or governing body as a local law prescribing a general and permanent rule for persons or things within the corporate boundaries.

A resolution is an appropriate form for an act of temporary character, not prescribing a permanent rule of government.

"By-law" is the general term applicable to the self-adopted rules of all classes of corporations; "ordinance" is used to describe the self-governing rule of a municipality.<sup>74</sup> It is not so comprehensive as "regulation" and is more solemn and formal than "resolution."<sup>75</sup> "Ordinance" is a continuing regulation, while "resolution," though sometimes held to enact a law, is usually declared not to be the equivalent of an ordinance, but rather an act of a temporary character, not prescribing a permanent rule of government.<sup>76</sup> A resolution is the appropriate form of corporate action for the removal of an officer, the acceptance of a dedication, the levying of a tax for a specific purpose, the purchase of corporate property, the making of corporate contracts, and the ratification of acts of agents, and the like.<sup>77</sup> The authority of the Legislature to delegate to

<sup>74</sup> Commonwealth v. Turner, 1 CUSH. (Mass.) 493; Citizens' Gas & Mining Co. v. Elwood, 114 Ind. 332, 16 N. E. 624.

<sup>75</sup> Blanchard v. Bissell, 11 Ohio St. 96; Taylor v. Lambertville, 43 N. J. Eq. 107, 10 Atl. 809.

But a resolution passed with all the formalities and notified to the public in the same manner as an ordinance might have the force and effect of an ordinance. City of Cape Girardeau v. Fougeu, 30 Mo. App. 551; Steenerson v. Fontaine, 106 Minn. 225, 119 N. W. 400.

<sup>76</sup> Butler v. City of Passaic, 44 N. J. Law, 171; Merchants' Union Barb Wire Co. v. Chicago, B. & Q. Ry. Co., 70 Iowa, 105, 28 N. W. 494; Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815.

<sup>77</sup> Egan v. City of Chicago, 5 Ill. App. 70; City of Indianapolis v. Imberry, 17 Ind. 175; Sower v. City of Philadelphia, 35 Pa. 231; Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22

a municipal corporation this power of local legislation as to public affairs affecting the municipality, though challenged often and in nearly all the states, has been uniformly upheld by the courts, and must be regarded as settled law.<sup>78</sup>

### SAME—MODE OF ENACTMENT

50. Where the charter, or the general law, prescribes the procedure for the enactment of ordinances, it must be complied with, else the ordinance is void.

The procedure to be observed in the enactment of ordinances varies greatly according to the charters of the various municipalities or the statutes of the various states. Nevertheless,

C. C. A. 171, 34 L. R. A. 518; City of Cape Girardeau v. Fougeu, 30 Mo. App. 551; Central R. Co. v. City of Elizabeth, 35 N. J. Law, 359; Atchison Board of Education v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573.

<sup>78</sup> Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 508, 24 Am. Rep. 756; State v. Tryon, 39 Conn. 183; Mason v. City of Shawneetown, 77 Ill. 533; CITY OF DULUTH v. KRUPP, 46 Minn. 435, 49 N. W. 235, Cooley, Cas. Mun. Corp. 250; State ex rel. Pearson v. Hayes, 61 N. H. 314; Markle v. Town Council of Akron, 14 Ohio, 586; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Village of Gloversville v. Howell, 70 N. Y. 287; Batsel v. Blaine (Tex. App.) 15 S. W. 283; State ex rel. Smith v. Anderson, 26 Fla. 240, 8 South. 1; Trenton Horse R. Co. v. Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. Rep. 183; Perdue v. Ellis, 18 Ga. 586; Trigally v. Mayor, etc., of City of Memphis, 6 Cold. (Tenn.) 382; Metcalf v. City of St. Louis, 11 Mo. 103; Heland v. City of Lowell, 3 Allen (Mass.) 407, 81 Am. Dec. 670; Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; City of Little Rock v. Town of Little Rock, 72 Ark. 195, 79 S. W. 785; Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Town of Ocean Springs v. Green, 77 Miss. 472, 27 South. 743; Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186.

the general rule stated in the black letter text prevails.<sup>79</sup> For example, if the law requires that the ordinance shall be read at three different meetings before final passage, such provision is mandatory and essential to a valid ordinance;<sup>80</sup> but the reading may be at a special or adjourned meeting;<sup>81</sup> and in one case it was held that the statute was complied with by a reading at one meeting by title merely,<sup>82</sup> and in another it was ruled that a new council, on a single reading before it, may pass an ordinance twice read before its predecessor.<sup>83</sup> Where no mode is prescribed by law for enacting ordinances, the council may prescribe the mode by its own rules of order, or by ordinance; or, lacking either of these regulations, it may proceed in accordance with parliamentary law.<sup>84</sup>

#### *Form—Record—Veto*

An ordinance should have the form of legislation, but this is not essential to its validity.<sup>85</sup> The appropriate form of an

<sup>79</sup> Savage v. City of Tacoma, 61 Wash. 1, 112 Pac. 78. But compare City of Bluefield v. Johnson, 68 W. Va. 303, 69 S. E. 848.

<sup>80</sup> SWINDELL v. STATE ex rel. MAXEY, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50, Cooley, Cas. Mun. Corp. 122; Thatcher v. City of Toledo, 19 Ohio Cir. Ct. R. 311, 10 O. C. D. 272. But see Landes v. State ex rel. Matson, 160 Ind. 479, 67 N. E. 189; Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946.

A city ordinance, when put on its passage, should be the same in substance as that introduced at the previous meeting. South Jersey Telegraph Co. v. City of Woodbury, 73 N. J. Law, 276, 63 Atl. 4.

<sup>81</sup> Cutcomp v. Utt, 60 Iowa, 156, 4 N. W. 214; Schofield v. Village of Tampico, 98 Ill. App. 324. But see Flood v. Atlantic City, 63 N. J. Law, 530, 42 Atl. 829.

<sup>82</sup> Anderson v. Camden, 58 N. J. Law, 515, 33 Atl. 846. Compare Bill Posting Sign Co. v. Atlantic City, 71 N. J. Law, 72, 58 Atl. 342.

<sup>83</sup> McGraw v. Whitson, 69 Iowa, 348, 28 N. W. 632.

<sup>84</sup> SWINDELL v. STATE ex rel. MAXEY, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50, Cooley, Cas. Mun. Corp. 122; Swift v. People ex rel. Ferris Wheel Co., 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; Butler v. City of Passaic, 44 N. J. Law, 171; First Municipality v. Cutting, 4 La. Ann. 336; Robinson v. Mayor, etc., of Town of Franklin, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625; McGavock v. City of Omaha, 40 Neb. 64, 58 N. W. 543.

<sup>85</sup> Rumsey Mfg. Co. v. Inhabitants of Town of Schell City, 21 Mo. App. 175; City of Rockville v. Merchant, 60 Mo. App. 365; Town of

ordinance is, "Be it ordained by the common council," etc.; but acts of the common council are interpreted by the courts in accordance with their manifest purpose and subject-matter; wherefore, it has been held that a formal resolution was an ordinance, when it prescribed a permanent rule of action and was passed in the mode required for ordinances.<sup>86</sup> And so of any other action taken by the common council with due deliberation, expressing its legislative intention and authority. The ordinance must be duly recorded,<sup>87</sup> and, if executive approval is required, must receive the formal indorsement of the mayor.<sup>88</sup> If, however, formal approval be not required, and the mayor is given the veto power, his assent will be presumed

Lisbon v. Clark, 18 N. H. 234. An ordaining or enacting clause is not essential to the validity of an ordinance, even though prescribed by the municipal charter. Chicago & E. I. R. Co. v. Hines, 82 Ill. App. 488. Contra, Galveston H. & S. A. Ry. Co. v. Harris (Tex. Civ. App.) 36 S. W. 776.

<sup>86</sup> City of Rockville v. Merchant, 60 Mo. App. 365; Town of Lisbon v. Clark, 18 N. H. 234; People v. Murray, 57 Mich. 396, 24 N. W. 118; City of Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12; Merchants' Union Barb Wire Co. v. Chicago, B. & Q. Ry. Co., 70 Iowa, 105, 28 N. W. 494; Sower v. City of Philadelphia, 35 Pa. 231; San Francisco Gas Co. v. City of San Francisco, 6 Cal. 190; City of Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503; Gleason v. Barnett, 61 S. W. 20, 22 Ky. Law Rep. 1660.

<sup>87</sup> Provisions of the charter or statute requiring ordinances to be recorded are construed as directory merely, and recording is not regarded as essential to the validity of the ordinance, unless such intention is clearly expressed. Stevenson v. Bay City, 26 Mich. 44; Trustees of Erie Academy v. City of Erie, 31 Pa. 515; Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532.

<sup>88</sup> City of Central v. Sears, 2 Colo. 588; Ladd v. City of East Portland, 18 Or. 87, 22 Pac. 533; Kepner v. Commonwealth ex rel. City of Harrisburg, 40 Pa. 124; Reilly v. Racine, 51 Wis. 526, 8 N. W. 417; New York & N. E. R. Co. v. City of Waterbury, 55 Conn. 19, 10 Atl. 162; Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189; Whitney v. City of Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291; Ashley v. Mayor, etc., of City of Newark, 25 N. J. Law, 399; Padavano v. Fagan, 66 N. J. Law, 167, 48 Atl. 998; Landes v. State ex rel. Matson, 160 Ind. 479, 67 N. E. 189; City of Erie v. Bier, 10 Pa. Super. Ct. 381.

from failure to veto within the time prescribed.<sup>89</sup> When an ordinance is vetoed, the council may reconsider it, but only once, and within a prescribed limit of time.<sup>90</sup> An ordinance passed over the veto requires no further act of the mayor.<sup>91</sup>

#### *Publication*

It is the general, and ought to be the universal, law that no ordinance shall take effect until duly published; but in some states the Draconian precedent seems to be recognized, and it has been held that provisions for publication were directory only.<sup>92</sup> The general doctrine, however, is that such provisions are mandatory, and in favor of personal right and liberty they are strictly construed; so that actual notice has been held not

<sup>89</sup> Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653; State v. Henderson, 38 Ohio St. 644; Martindale v. Palmer, 52 Ind. 411.

<sup>90</sup> Peck v. City of Rochester (Sup.) 3 N. Y. Supp. 873; Sank v. City of Philadelphia, 8 Phila. (Pa.) 118; People ex rel. United States Standard Voting Mach. Co. v. City of Geneva, 45 Misc. Rep. 237, 92 N. Y. Supp. 91, affirmed 98 App. Div. 383, 90 N. Y. Supp. 275.

<sup>91</sup> Ashton v. City of Rochester, 60 Hun, 372, 14 N. Y. Supp. 855. But where a resolution was vetoed by the mayor and returned to the council, who altered it to meet one of the objections set out in the veto, and again passed it, the resolution as last passed could not become effective until again submitted to the mayor for his approval, since by the alteration it became a new resolution. Padavan v. Fagan, 66 N. J. Law, 167, 48 Atl. 998.

<sup>92</sup> Schwartz v. City of Oshkosh, 55 Wis. 490, 13 N. W. 450; Carpenter v. Yeadon Borough, 208 Pa. 396, 57 Atl. 837; Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364; Barnett v. Town of Newark, 28 Ill. 62; City of Napa v. Easterby, 61 Cal. 509; Id., 76 Cal. 222, 18 Pac. 253; Meyer v. Fromm, 108 Ind. 208, 9 N. E. 84; Waln's Heirs v. City of Philadelphia, to Use of Armstrong, 99 Pa. 330; Higley v. Bunce, 10 Conn. 567. But see Commonwealth v. McCafferty, 145 Mass. 384, 14 N. E. 451; City of Sacramento v. Dillman, 102 Cal. 107, 36 Pac. 385; Elmendorf v. Mayor, etc., of City of New York, 25 Wend. (N. Y.) 693; Reed v. City of Louisville, 61 S. W. 11, 22 Ky. Law Rep. 1636; City of Central v. Sears, 2 Colo. 588; Rutgers College Athletic Ass'n v. City of New Brunswick, 55 N. J. Law, 279, 26 Atl. 87; Rumsey Mfg. Co. v. Inhabitants of Town of Schell City, 21 Mo. App. 175; Town of Stillwater v. Moor (Okl.) 33 Pac. 1024.

sufficient without publication.<sup>93</sup> The publication must be, of course, in the manner and to the extent prescribed in the statute.<sup>94</sup> If not particularly prescribed, then it may be by printing in newspapers, according to the American usage, or by posting in public places, according to the practice of Continental Europe. But the publication must be reasonably sufficient to convey information to the inhabitants of the corporation.<sup>95</sup>

#### *Amendment and Repeal*

An ordinance cannot be amended by a mere resolution,<sup>96</sup> but only by another ordinance, enacted with the same formalities as the original ordinance.<sup>97</sup>

An ordinance once duly enacted remains in force until re-

<sup>93</sup> National Bank of Commerce v. Town of Greneda (C. C.) 44 Fed. 262; O'Hara v. Town of Park River, 1 N. D. 279, 47 N. W. 380. An ordinance requiring a municipal ordinance to be published for a stated time, with a notice of the time of its consideration, is mandatory. Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364.

<sup>94</sup> Meyer v. Fromm, 108 Ind. 208, 9 N. E. 84; City of Napa v. Easterby, 61 Cal. 509; Id., 76 Cal. 222, 18 Pac. 253; Schwartz v. City of Oshkosh, 55 Wis. 490, 13 N. W. 450; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Waln's Heirs v. City of Philadelphia, to Use of Armstrong, 99 Pa. 330; City of Chicago v. McCoy, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413; De Loge v. New York Cent. & H. R. R. Co., 157 N. Y. 688, 51 N. E. 1090.

Publication of a city ordinance in an extra edition of a daily newspaper, and the distribution of 50 to 100 copies of such edition by parties interested in the ordinance, is not a publication in a newspaper of general circulation. State ex rel. Bump v. Omaha & C. B. Ry. & Bridge Co., 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357.

<sup>95</sup> Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723. As to publication on Sunday, see Mayor, etc., of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

<sup>96</sup> Hope v. City of Alton, 116 Ill. App. 116, affirmed 214 Ill. 102, 73 N. E. 406.

<sup>97</sup> Chicago, I. & L. Ry. Co. v. Town of Salem, 166 Ind. 71, 703, 76 N. E. 631, 634.

pealed.<sup>18</sup> The same vote is required to repeal as to enact.<sup>19</sup> Repeal may be effected by implication as well as by expression.<sup>20</sup> But here the same rules apply as to state statutes.<sup>21</sup> The Legislature may also repeal a municipal ordinance by express legislation or by necessary implication, the rule being that if the subsequent state statute, or a subsequent ordinance, is necessarily repugnant to the ordinance, and the intention to repeal is obvious, then the ordinance is thereby repealed.<sup>22</sup>

### ESSENTIALS OF VALID ORDINANCE

51. An ordinance may be void not only for want of corporate power to enact it, or for the failure to observe the prescribed procedure essential to its validity, but also because it is contrary to certain well-established doctrines of the law in regard to such regulations, chief of which are that a municipal ordinance, in order to be valid—

- (a) Must not contravene constitution or statute.
- (b) Must not be oppressive.

<sup>18</sup> A valid city ordinance when passed never becomes obsolete, but remains in force until repealed by the corporation. *Shroder v. City of Lancaster* (Pa. 1875) 6 Lanc. Bar, 201; *Wilson v. Spencer*, 22 Va. 76, 10 Am. Dec. 491.

<sup>19</sup> *1 Dill. Mun. Corp.* § 282; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *Robinson v. City of Baltimore*, 93 Md. 208, 49 Atl. 4. An ordinance cannot be repealed, amended, or suspended by a resolution. *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *City of Joliet v. Petty*, 96 Ill. App. 450.

<sup>20</sup> *Staples v. Bridgeport*, 75 Conn. 509, 54 Atl. 194; *City of Joliet v. Petty*, *supra*; *Schmidt v. Lewis*, 63 N. J. Eq. 565, 52 Atl. 707; *Budd v. Camden Horse Ry. Co.*, 63 N. J. Eq. 504, 52 Atl. 1130; *City of Grand Rapids v. Norman*, 110 Mich. 544, 68 N. W. 269; *Knight v. Town of West Union*, 45 W. Va. 195, 32 S. E. 163; *Smyrk v. Sharp*, 82 Md. 97, 35 Atl. 411; *Dutton v. City of Aurora*, 114 Ill. 138, 28 N. E. 461; *Van der Leith v. State*, 60 N. J. Law, 46, 37 Atl. 436.

<sup>21</sup> *Booth v. Town of Carthage*, 67 Ill. 102; *City of Providence v. Union R. Co.*, 12 R. I. 473.

<sup>22</sup> *Southport v. Ogden*, 23 Conn. 128; *Town of Marietta v. Fearing*, 4 Ohio, 427; *Horr & B. Mun. Ord.* §§ 60, 61.

- (c) Must be impartial, fair, and general.
- (d) Must not prohibit, but may regulate, trade.
- (e) Must not contravene common right.
- (f) Must be consistent with public policy.
- (g) Must not be unreasonable.

The power of municipal legislation must, of course, be conferred by the state, and is usually found in the municipal charter. This has already received consideration, and it scarcely need be said that the municipality cannot extend or enlarge its charter powers by its own ordinances.<sup>4</sup> These acts must be within the express or implied powers of the corporation, and they must be enacted according to the legislative mandate, otherwise they will be void.<sup>5</sup> But the mere fact that there is some irregularity in the enactment of the ordinance will not render it void, if it is otherwise unobjectionable.<sup>6</sup>

#### *Motives of Members*

The motives of councilmen in passing an ordinance have been held not to be the subject of judicial inquiry;<sup>7</sup> but it has

<sup>4</sup> PEOPLE v. ARMSTRONG, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; Cooley, Cas. Mun. Corp. 141; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242; State ex rel. Kercheval v. Mayor, etc., of City of Nashville, 15 Lea (Tenn.) 697, 54 Am. Rep. 427; Thompson v. Carroll, 22 How. (U. S.) 422, 16 L. Ed. 387; Commonwealth v. Roy, 140 Mass. 432, 4 N. E. 814; Mays v. City of Cincinnati, 1 Ohio St. 268; Garden City v. Abbott, 34 Kan. 283, 8 Pac. 473.

A charter is the organic law of the municipality, and an ordinance in conflict therewith is void. Kemp v. Monett, 95 Mo. App. 452, 69 S. W. 31.

<sup>5</sup> Rau v. City of Little Rock, 34 Ark. 303; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242; Mayor, etc., of City of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452; State v. Kantler, 33 Minn. 69, 21 N. W. 856; Pike v. Megoun, 44 Mo. 491; Anne Arundel County Com'rs v. Duckett, 20 Md. 468, 83 Am. Dec. 557; Borough of Freeport v. Marks, 59 Pa. 257; Paine v. City of Boston, 124 Mass. 486; Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; Baker v. State, 27 Ind. 485; Villavaso v. Barthet, 39 La. Ann. 247, 1 South. 599.

<sup>6</sup> Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; Clark v. City of Elizabeth, 61 N. J. Law, 565, 40 Atl. 616, 737; In re Broad St., 9 Kulp (Pa.) 37.

<sup>7</sup> Buell v. Ball, 20 Iowa, 282; Lilly v. City of Indianapolis, 149

also been held that an ordinance procured by fraud or bribery is invalid,<sup>8</sup> and Judge Dillon protests that it would be disastrous to apply to its full extent to municipal ordinances the rule as to general legislation forbidding inquiry into the motives of members of Congress and legislators, "for," says he, "municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others."<sup>9</sup>

### *Special Authority*

When the Legislature has granted authority to the corporation to pass a particular by-law, and the by-law is in pursuance of and within the limits of this authority, it is the same as though the Legislature had enacted the by-law, and the only objection tenable is such as would lie against the legislative act, to wit, its unconstitutionality. But many by-laws are enacted under a general grant of power vesting large discretion in the municipal council, and sometimes by-laws are passed under the implied inherent power of a municipality to make by-laws.<sup>10</sup>

Ordinances passed under such conditions may be challenged as illegal, unless they conform to certain fixed rules of law, namely: (1) They must not contravene the Constitution or

Ind. 648, 49 N. E. 887; *People v. Gardner*, 143 Mich. 104, 106 N. W. 541; *Wood v. City of Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; *Wright v. Defrees*, 8 Ind. 298; *Borough of Freeport v. Marks*, 59 Pa. 253; *Cooley, Const. Lim.* pp. 186, 208; *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. 599; *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812. But see *State ex rel. Attorney General v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262.

<sup>8</sup> *State ex rel. Attorney General v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262; *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S. W. 743; *Davis v. Mayor of City of New York*, 1 Duer (N. Y.) 451; *In re Frederick Street*, 12 Pa. Co. Ct. R. 577.

<sup>9</sup> 1 Dill. Mun. Corp. § 311.

<sup>10</sup> *City of Mt. Pleasant v. Breeze*, 11 Iowa, 399; *State v. Webber*, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465; *Clark v. City of South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *McPherson v. Village of Chébanse*, 114 Ill. 46, 28 N. E. 454, 55 Am. Rep. 857.

statutes; (2) they must not be oppressive; (3) they must be impartial, fair, and general; (4) they may regulate, but must not prohibit, trade; (5) they must not contravene common right; (6) they must be consistent with public policy; (7) they must be reasonable.

#### *Contrary to Constitution or Statute*

It would seem to be fundamental that a city ordinance which contravenes provisions of the federal or state Constitutions intended to secure the rights of person or property is void. As illustrations of this principle, ordinances have been declared invalid which empower purchasers of land at a tax sale to call upon the police to put them into possession;<sup>11</sup> which imposed a license upon towboats engaged in interstate commerce;<sup>12</sup> which required a cotton dealer to report to the police the names of all sellers of loose cotton, with the amount purchased by him;<sup>13</sup> which discriminate between resident and nonresident traders;<sup>14</sup> which donated the bodies of dead animals to certain third parties.<sup>15</sup> The foregoing ordinances were all declared repugnant to constitutional principles, and therefore void. So, likewise, an ordinance contravening any public statute would be void, unless it were specially authorized by statute so plain and unmistakable as to amount to a legislative repeal of the former statute thus contravened.<sup>16</sup>

<sup>11</sup> Calhoun v. Fletcher, 63 Ala. 574. It deprives a citizen of property without "due process of law."

<sup>12</sup> Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653; Ex parte Holmquist (Cal.) 27 Pac. 1099. It contravenes federal authority to "regulate commerce among the states."

<sup>13</sup> Long v. Taxing Dist. of Shelby County, 7 Lea (Tenn.) 134, 40 Am. Rep. 55. An unwarranted infringement on personal liberty.

<sup>14</sup> Thompson v. Ocean Grove Camp Meeting Ass'n, 55 N. J. Law, 507, 26 Atl. 798; City of Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857. Denies to citizens of the United States the equal protection of the law.

<sup>15</sup> Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6. No "due process of law," nor "just compensation" for private property taken.

<sup>16</sup> State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Mark v. State, 97

*Must Not be Oppressive*

As the powers of a municipality are derived from legislative acts controlled by constitutional safeguards, an ordinance which operates oppressively and tyrannically on any individual or class of individuals cannot be sustained.<sup>17</sup> The courts have not hesitated under this wholesome doctrine to invalidate mandatory ordinances which interfere with the ordinary liberty of the citizen, as, for example, an ordinance ordering the arrest, imprisonment, and punishment of a free negro found out of doors after 10 o'clock at night;<sup>18</sup> one punishing any person knowingly associating with persons having the reputation of being thieves and prostitutes;<sup>19</sup> so, one committing the right to erect and maintain a steam engine and boiler to the unbridled discretion of the mayor;<sup>20</sup> also one denying the use of water from the city waterworks to any one who owed, or whose tenant owed, a bill for water supplied in a previous year, or to a different house;<sup>21</sup> so, one committing to an arbitrary official discretion to allow or prohibit street parades;<sup>22</sup> also one forbidding a licensed retailer of liquors to sell be-

<sup>17</sup> N. Y. 572; *In re Snell*, 58 Vt. 207, 1 Atl. 566; *Cross v. Mayor, etc., of Town of Morristown*, 33 N. J. Law, 57.

<sup>18</sup> *City of San Antonio v. Salvation Army* (Tex. Civ. App.) 127 S. W. 860; *City of Salem ex rel. Roney v. Young*, 142 Mo. App. 160, 125 S. W. 857; *Toney v. City of Macon*, 119 Ga. 83, 46 S. E. 80; *CITY OF CHICAGO v. GUNNING SYSTEM*, 114 Ill. App. 377, affirmed 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, Cooley, Cas. Mun. Corp. 129; *Laviosa v. Chicago, St. Louis & N. O. R. Co.*, McGloin (La.) 299; *City of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Skinker v. Heman*, 64 Mo. App. 441.

<sup>19</sup> *Mayor, etc., of City of Memphis v. Winfield*, 8 Humph. (Tenn.) 707.

<sup>20</sup> *City of St. Louis v. Fitz*, 53 Mo. 582.

<sup>21</sup> *Mayor, etc., of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

<sup>22</sup> *Dayton v. Quigley*, 29 N. J. Eq. 77.

<sup>22</sup> *STATE ex rel. GARRABAD v. DERING*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948, Cooley, Cas. Mun. Corp. 135; *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 311. But see *Commonwealth v. Davis*, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389; *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71.

tween the hours of 6 p. m. and 6 a. m.;<sup>23</sup> and likewise one forbidding such sale whenever any denomination of Christian people are holding divine services.<sup>24</sup>

*Must be Impartial, Fair, and General*

That it may be valid, an ordinance must be fair in its terms, impartial in operation, and general in its application; that is, applying alike to all persons under practically similar conditions and circumstances.<sup>25</sup> A regulation requiring certain water consumers to put in expensive meters under penalty of cutting off the water supply was held void for unwarranted discrimination;<sup>26</sup> so one requiring a certain individual named to do certain acts in respect to a building, and imposing a penalty for noncompliance, was held void;<sup>27</sup> as also one requiring particular individuals by name to construct local improvements in front of their lots;<sup>28</sup> so also one forbidding the repairing, altering, or rebuilding any frame building within fire limits, the cost of which should exceed three hundred dollars;<sup>29</sup> also one prohibiting dairies within certain designated limits without the consent of the city council.<sup>30</sup> So, too, an ordinance making the obtaining of money by willful misrepresentation a crime only when done by one conducting an em-

<sup>23</sup> *Ward v. Mayor, etc., of Town of Greeneville*, 8 Baxt. (Tenn.) 228, 35 Am. Rep. 700.

<sup>24</sup> *Gilham v. Wells*, 64 Ga. 192. See, also, *State v. Strauss*, 49 Md. 288.

<sup>25</sup> *City of Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263; *Hardee v. Brown*, 56 Fla. 377, 47 South. 834; *Sioux City v. Simmons Hardware Co.*, 151 Iowa, 334, 129 N. W. 978, 131 N. W. 17; *Ex parte Wilcox*, 14 Cal. App. 164, 111 Pac. 374; *Board of Council of Harrodsburg v. Renfro (Ky.)* 58 S. W. 795, 51 L. R. A. 897; *State ex rel. Bump v. Omaha & C. B. Ry. & Bridge Co.*, 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357.

<sup>26</sup> *Red Star Line S. S. Co. v. Mayor, etc., of Jersey City*, 45 N. J. Law, 246.

<sup>27</sup> *First Municipality of New Orleans v. Blineau*, 3 La. Ann. 688.

<sup>28</sup> *Whyte v. Mayor, etc., of Town of Nashville*, 2 Swan (Tenn.) 364.

<sup>29</sup> *First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185.

<sup>30</sup> *State v. Mahner*, 43 La. Ann. 496, 9 South. 480.

ployment office is invalid.<sup>31</sup> On the other hand, an ordinance requiring bicycles to carry a light after dark is not objectionable because it does not apply to riders or drivers of other silently running vehicles.<sup>32</sup>

#### *Must Not Prohibit, but May Regulate, Trade*

Under the rule that an ordinance may regulate, but must not prohibit, trade, an ordinance has been declared void which fixed one rate of license for selling goods which are within or in transit to the city, and another rate for goods which are not within or in transit to the city;<sup>33</sup> so also one requiring municipal licenses from nonresidents driving interurban carriages or omnibuses into the city.<sup>34</sup> And it has been held in New Jersey that whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the municipality must show its authority under plain and specific legislative enactment.<sup>35</sup> It has also been held that an ordinance, which prohibits any person bringing secondhand clothing into a city or town, or exposing it for sale therein without proof of its noninfection, is an unwarranted interference with trade.<sup>36</sup>

#### *Must Not Contravene Common Right*

In some cases ordinances have been declared invalid because they contravene common rights; that is, such rights as are understood to be common to all. As illustrating this principle, ordinances to the following effect have been declared invalid: One imposing a license tax for selling lemonade and

<sup>31</sup> City of Spokane v. Macho, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263.

<sup>32</sup> City of Des Moines v. Keller, 116 Iowa, 648, 88 N. W. 827, 57 L. R. A. 243, 93 Am. St. Rep. 268.

<sup>33</sup> Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642.

<sup>34</sup> Commonwealth v. Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679.

<sup>35</sup> Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33.

<sup>36</sup> Kosciusko v. Slomberg, 68 Miss. 469, 9 South. 297, 12 L. R. A. 528, 24 Am. St. Rep. 281.

cake at a temporary stand on the sidewalk;<sup>37</sup> one requiring a license fee of three hundred dollars from an auctioneer, two hundred dollars from butchers, and twenty dollars from a peddler;<sup>38</sup> one forbidding hotel runners from going within twenty feet of a railroad train, though permitted to do so by the railroad company;<sup>39</sup> one forbidding the renting of private property to lewd women;<sup>40</sup> and one which required stores, except drug stores, for the sale of drugs and medicines, to be closed at 7:30 in the evening, except on Saturdays.<sup>41</sup>

#### *Must be Consistent with Public Policy*

The general principle already stated, that city ordinances must not contravene the Constitution and statutes of the state, must be construed as including also the further principle that such ordinances must not be inconsistent with the public policy of the state as declared in the statutes. Thus, where a statute prohibited incorporated towns from subjecting the stray animals of nonresidents to corporate ordinances, a by-law visiting a penalty on the nonresident owner was held void;<sup>42</sup> and also, in the same state, the ordinance of a municipal corporation with charter power to pass all by-laws deemed necessary for health, cleanliness, etc., and with power to abate nuisances, which restrained cattle from running at large, was held void as being in contravention of the general

<sup>37</sup> Barling v. West, 29 Wis. 307, 9 Am. Rep. 576.

<sup>38</sup> City of St. Paul v. Colter, 12 Minn. 41 (GIL. 16), 90 Am. Dec. 278; City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; Town of State Center v. Barenstein, 66 Iowa, 249, 23 N. W. 652.

<sup>39</sup> Napman v. People, 19 Mich. 352; City of Chillicothe v. Brown, 38 Mo. App. 609; Haynes v. City of Cape May, 52 N. J. Law, 180, 19 Atl. 176; State v. Robinson, 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339.

<sup>40</sup> Milliken v. City Council of City of Weatherford, 54 Tex. 388, 38 Am. Rep. 629. Compare L'Hote v. New Orleans, 177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899.

<sup>41</sup> STATE v. RAY, 131 N. C. 814, 42 S. E. 960, 60 L. R. A. 634, 92 Am. St. Rep. 795, Cooley, Cas. Mun. Corp. 132.

<sup>42</sup> Town of Marietta v. Fearing, 4 Ohio, 427.

policy of the state to allow animals to run at large.<sup>43</sup> And where the general statutes of the state abolished the system of hay inspection, and in lieu required the sellers of hay to prepare their hay for market in a particular manner under penalty for noncompliance, a city ordinance prohibiting the sale of pressed hay without inspection was declared void as in conflict with public policy.<sup>44</sup>

But the mere fact that a city ordinance covers substantially the same subject-matter as a statute does not render the ordinance void.<sup>45</sup> For example, the fact that a general statute limits the speed of motor vehicles will not prevent further restriction by ordinance, provided such ordinance is reasonable under the special conditions.<sup>46</sup>

The rule is simply that the ordinance must not conflict with the general statute on the subject, and in determining this point the court should take into consideration, not only the ordinance and the statute, but the evils intended to be remedied, and by the application of common-sense principles to the circumstances of each particular case should sustain the ordinance if it can be reconciled to the statute.<sup>47</sup>

A city may not by ordinance make an act illegal which is legal under the statutes.<sup>48</sup> Nor can it license what the state has expressly forbidden.<sup>49</sup>

<sup>43</sup> Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec. 465. Contra, Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201.

<sup>44</sup> Mayor, etc., of City of New York v. Nichols, 4 Hill (N. Y.) 209. Cf. Rogers v. Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493, and Hoffman v. Mayor, etc., of Jersey City, 34 N. J. Law, 172.

<sup>45</sup> Schmidt v. City of Indianapolis, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 385, 14 L. R. A. (N. S.) 787; Christenson v. Tate, 87 Neb. 848, 128 N. W. 622; City of St. Louis v. Klausmeier, 213 Mo. 119, 112 S. W. 516; Incorporated Town of Avoca v. Heller, 129 Iowa, 227, 105 N. W. 444; In re Jahn, 55 Kan. 694, 41 Pac. 956.

<sup>46</sup> Christenson v. Tate, 87 Neb. 848, 128 N. W. 622; Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724.

<sup>47</sup> In re Desanta, 8 Cal. App. 295, 96 Pac. 1027; Callaway v. Mims, 5 Ga. App. 9, 62 S. E. 654.

<sup>48</sup> State v. Eubanks, 154 N. C. 628, 70 S. E. 466; People v. Gilbert, 68 Misc. Rep. 48, 123 N. Y. Supp. 264.

<sup>49</sup> People v. Gilbert, 68 Misc. Rep. 48, 123 N. Y. Supp. 264. A

*Must Not be Unreasonable*

While it is unquestionably a fundamental and general rule that an ordinance to be valid, must be reasonable,<sup>50</sup> it is generally conceded that the question as to the reasonableness or unreasonableness of an ordinance cannot arise where the ordinance is a valid exercise of a power expressly granted to the municipality;<sup>51</sup> but the rule applies in full force only when the ordinance is passed in the exercise of the general or implied powers.<sup>52</sup>

The reasonableness of an ordinance is not to be tested by its application to extreme cases.<sup>53</sup> The court should consider

municipal ordinance making it unlawful for any person to rent any house to any lewd woman, outside of prescribed limits, impliedly makes it lawful to rent houses to such persons within the prescribed limits, and is, therefore, invalid as suspending the laws of the state punishing prostitution and the keeping of houses of prostitution. McDonald v. Denton (Tex. Civ. App.) 132 S. W. 823.

<sup>50</sup> City of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Skinker v. Heman, 64 Mo. App. 441; Long v. Mayor, etc., of Jersey City, 37 N. J. Law, 348; Kirkham v. Russell, 76 Va. 956; CITY OF CHICAGO v. GUNNING SYSTEM, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, Cooley, Cas. Mun. Corp. 129, affirming 114 Ill. App. 377; State v. Cederaski, 80 Conn. 478, 69 Atl. 19; Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; PEOPLE v. ARMSTRONG, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578, Cooley, Cas. Mun. Corp. 141. And see cases cited in the following notes.

<sup>51</sup> PEOPLE v. ARMSTRONG, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578, Cooley, Cas. Mun. Corp. 141; Beiling v. City of Evansville, 144 Ind. 644, 42 N. E. 625, 35 L. R. A. 272; Chimmene v. Baker, 32 Tex. Civ. App. 520, 75 S. W. 330; Skaggs v. City of Martinsville, 140 Ind. 476, 39 N. E. 241, 33 L. R. A. 781, 49 Am. St. Rep. 209; Louisville & N. R. Co. v. City of Louisville, 141 Ky. 181, 132 S. W. 184; State v. Payssan, 47 La. Ann. 1029, 17 South. 481, 49 Am. St. Rep. 390; Ligonier Valley R. Co. v. Latrobe Borough, 216 Pa. 221, 65 Atl. 548.

<sup>52</sup> Weigand v. District of Columbia, 22 App. D. C. 559; PEOPLE v. ARMSTRONG, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578, Cooley, Cas. Mun. Corp. 141; Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643; Skinker v. Heman, 64 Mo. App. 441; State v. Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410.

<sup>53</sup> Commonwealth v. Cutter, 156 Mass. 52, 29 N. E. 1146.

the circumstances of the particular city or corporation, the object sought to be attained, and the necessity which exists for the ordinance.<sup>54</sup>

The rule that ordinances must be reasonable belongs to that class of rules whereby the judiciary have reserved to themselves the power of doing justice in hard cases, and under it more ordinances have been challenged and more decisions made than under all the preceding rules. The decisions concur that the reasonableness of an ordinance is matter for the court, and not for the jury;<sup>55</sup> and this revives Selden's objection to equity that it was "a roguish thing, having no standard but the whim or notion of the Lord Chancellor"; and the "length of the Chancellor's foot was the measure of equity."<sup>56</sup> But the rule has survived through many generations of lawyers and judges, and is held applicable to the by-laws of all classes of corporations.

#### *Same—Unreasonable Ordinances*

Under this rule the following ordinances have been declared to be unreasonable and void: An ordinance exacting a license from peddlers in the discretion of the mayor;<sup>57</sup> one requiring the building of a sidewalk in an uninhabited portion of the city;<sup>58</sup> requiring all peddlers to pay a license fee of two hundred dollars per month;<sup>59</sup> requiring transients to pay two

<sup>54</sup> Chicago & A. Ry. Co. v. City of Carlinville, 103 Ill. App. 251; City of Scranton v. Straff, 28 Pa. Super. Ct. 258; KNOBLOCH v. CHICAGO, M. & ST. P. RY. CO., 31 Minn. 402, 18 N. W. 106, Cooley, Cas. Mun. Corp. 245.

<sup>55</sup> Evison v. Chicago, St. P., M. & O. Ry. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; Merced County v. Fleming, 111 Cal. 46, 43 Pac. 392; State v. Fourcade, 45 La. Ann. 717, 13 South. 187, 40 Am. St. Rep. 249; State v. Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; City of St. Louis v. Weber, 44 Mo. 547; Kneedler v. Borough of Norristown, 100 Pa. 368, 45 Am. Rep. 384; Hawes v. City of Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Commonwealth v. Worcester, 3 Pick. (Mass.) 462.

<sup>56</sup> Bl. Comm. p. 433, note y.

<sup>57</sup> Town of State Center v. Barenstein, 66 Iowa, 249, 23 N. W. 652.

<sup>58</sup> Corrigan v. Gage, 68 Mo. 541.

<sup>59</sup> City of Peoria v. Gugenheim, 61 Ill. App. 374.

hundred and fifty dollars per month;<sup>60</sup> and so one requiring a license of ten dollars per day of an itinerant merchant; an ordinance forbidding the running of street cars during the winter months without vestibules;<sup>61</sup> also one prohibiting laundries except in brick or stone buildings;<sup>62</sup> one regulating the weight of baker's bread, prohibiting the sale of loaves weighing less than one and one-half pounds;<sup>63</sup> one forbidding the covering of packages of fruit with colored netting;<sup>64</sup> one forbidding to drive faster than an ordinary gait;<sup>65</sup> an ordinance exempting from license required of milkmen a dealer having not more than two cows, and delivering by hand;<sup>66</sup> also one requiring license of sojourning auctioneers only;<sup>67</sup> one prohibiting any vehicle used to carry passengers or freight for hire from standing in front of any hotel except when actually engaged in receiving or discharging passengers or freight;<sup>68</sup> also one requiring a street car company, under

<sup>60</sup> City of Ottumwa v. Zekind, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447.

<sup>61</sup> City of Yonkers v. Yonkers R. Co., 51 App. Div. 271, 64 N. Y. Supp. 955.

<sup>62</sup> City of Shreveport v. Robinson, 51 La. Ann. 1314, 26 South. 277; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. Contra, In re Yick Wo, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12.

<sup>63</sup> City of Buffalo v. Collins Baking Co., 39 App. Div. 432, 57 N. Y. Supp. 347; Contra, City of Mobile v. Yuille, 3 Ala. 187, 36 Am. Dec. 441; Paige v. Fazackerly, 36 Barb. (N. Y.) 392; Guillotte v. City of New Orleans, 12 La. Ann. 432.

<sup>64</sup> Frost v. City of Chicago, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301.

<sup>65</sup> Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

<sup>66</sup> Pierce v. City of Aurora, 81 Ill. App. 670. So, under a city charter authorizing the council to exempt any person from the operation of any ordinance or municipal regulation, an ordinance requiring a license from all milk sellers, except those who sell less than twenty quarts a day, is invalid. Gray v. City of Wilmington, 2 Marv. (Del.) 257, 43 Atl. 95.

<sup>67</sup> City of Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

<sup>68</sup> Ex parte Battis, 40 Tex. Cr. R. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. Rep. 708.

pawned.<sup>12</sup> Also ordinances requiring garbage to be removed in a closed vehicle labeled "Garbage";<sup>13</sup> and one requiring a lot owner to remove filth from a private way adjoining his land;<sup>14</sup> also one cutting off gas and water from consumers delinquent for 10 days,<sup>15</sup> have been held to be reasonable.

#### *Same—Discordant Rulings*

It will be noted from the foregoing cases that the decisions are not harmonious on this topic. What is reasonable in one city is unreasonable in another; and what seems reasonable to one court appears unreasonable to another, the decisions varying no doubt in accordance with the character of the city, the usages of the locality, the civic and municipal standards of the population, and the temperament of the judges. Recent and present tendencies are obviously towards stricter regulation and stronger presumption of the reasonableness of ordinances.

#### *Partial Invalidity*

An ordinance may be valid in part and void in part, and the valid part may be carried into effect, if what remains after the invalid part is eliminated contains the essential elements of a valid ordinance.<sup>16</sup> Thus, when an ordinance creates two

<sup>12</sup> Kuhn v. City of Chicago, 30 Ill. App. 203.

<sup>13</sup> People v. Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524; City of Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269.

<sup>14</sup> Commonwealth v. Cutter, 156 Mass. 52, 29 N. E. 1146.

<sup>15</sup> Commonwealth v. City of Philadelphia, 132 Pa. 288, 19 Atl. 136.

<sup>16</sup> Johnson v. Common Council of City of Bessemer, 148 Mich. 313, 106 N. W. 852; State v. Robb, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; City of Eureka v. Wilson, 15 Utah, 67, 48 Pac. 150, 62 Am. St. Rep. 904; CITY OF DULUTH v. KRUPP, 46 Minn. 435, 49 N. W. 235, Cooley, Cas. Mun. Corp. 250; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Wilcox v. Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; State ex rel. Hahn v. Hardy, 7 Neb. 377; Pennsylvania R. Co. v. Mayor, etc., of Jersey City, 47 N. J. Law, 286; Second Municipality of New Orleans v. Morgan, 1 La. Ann. 111; City of Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Canova v. Williams, 41 Fla. 509, 27 South. 30; Ex parte Bizzell, 112 Ala. 210, 21 South. 371.

Where one part of an ordinance is void, and another part valid,

or more offenses that are severable, and some of its provisions are invalid, those which are valid may be enforced.<sup>17</sup> If, however, the ordinance is entire, so that each part has a general influence over the rest, and a particular provision is void, the entire ordinance will be so declared.<sup>18</sup> An ordinance may, too, be valid as to certain persons or things and invalid as to others.<sup>19</sup>

### FINES AND PENALTIES

52. A penalty is an essential part of an ordinance, and a corporation having authority to enact an ordinance has the implied power to impose a fine as a penalty; but the power of imprisonment or forfeiture must be expressly conferred by the Legislature upon the municipality.

This doctrine of the common law has been generally recognized and enforced by the courts in America, but further than

the void part cannot have the effect to render the whole ordinance void. *Imes v. Chicago, B. & Q. R. Co.*, 105 Ill. App. 37. Where the invalid provisions of an ordinance can be eliminated without affecting the remainder, it will not be invalid in toto. *McNulty v. Toof*, 116 Ky. 202, 75 S. W. 258, 25 Ky. Law Rep. 430. But where an ordinance is invalid in part, and such part is so commingled with the valid portion as to make separation impossible, it is fatally defective. *Town of Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761.

<sup>17</sup> *Ex parte Bizzell*, 112 Ala. 210, 21 South. 371. Where the first section of an ordinance defines the offense of drunkenness and provides a penalty therefor, it may be sustained to that extent, though a second section is invalid, in that it provides that a village justice may, in his discretion, require the one convicted to give bail to keep the peace. *Village of Wykoff v. Healey*, 57 Minn. 14, 58 N. W. 685.

<sup>18</sup> *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *Attorney General v. Lowell*, 67 N. H. 198, 38 Atl. 270. As when an ordinance imposing an occupation tax provides an illegal method of enforcement. *City of Omaha v. Harmon*, 58 Neb. 339, 78 N. W. 623.

<sup>19</sup> *Kettering v. City of Jacksonville*, 50 Ill. 39; *Ex parte Cowert*, 92 Ala. 94, 9 South. 225. See *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

street between certain hours of the day;<sup>88</sup> one forbidding a hackney coach to stand within thirty feet of an entrance to a public building;<sup>89</sup> one requiring vehicles for hire to occupy designated stands.<sup>90</sup> So also an ordinance regulating the handling of trains in a city is valid which forbids trains from standing across a public street longer than two minutes;<sup>91</sup> or from stopping on a public street crossing except in case of emergency;<sup>92</sup> requiring flagmen at dangerous crossings;<sup>93</sup> forbidding strangers from getting on or off moving trains; also ordinances requiring street railway companies to make quarterly reports of the number of passengers carried;<sup>94</sup> requiring them to pave the streets through which their tracks run;<sup>95</sup> to provide a driver and conductor on each car.<sup>96</sup> A city may likewise regulate markets by ordinance providing that huckster wagons shall not stand in the market place for more than twenty minutes during certain hours;<sup>97</sup> that fresh beef shall not be sold in less than quarters except between dawn and 9 o'clock a. m.;<sup>98</sup> that only licensed occupants of stalls shall offer meats for sale at retail.<sup>99</sup>

<sup>88</sup> Commonwealth v. Brooks, 109 Mass. 355. And this applies to licensed peddlers. Commonwealth v. Fenton, 139 Mass. 195, 29 N. E. 653.

<sup>89</sup> Commonwealth v. Robertson, 5 Cush. (Mass.) 439.

<sup>90</sup> Commonwealth v. Matthews, 122 Mass. 60.

<sup>91</sup> Mayor, etc., of City of Birmingham v. Alabama G. S. Ry. Co., 98 Ala. 134, 13 South. 141.

<sup>92</sup> City of Duluth v. Mallett, 43 Minn. 204, 45 N. W. 154.

<sup>93</sup> Delaware, L. & W. R. Co. v. East Orange Tp., 41 N. J. Law, 127. Contra, Ravenna v. Pennsylvania Co., 45 Ohio St. 118, 12 N. E. 445. See Pittsburgh, C. C. & St. L. R. Co. v. Town of Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

<sup>94</sup> Bearden v. City of Madison, 73 Ga. 184; St. Louis v. St. Louis Ry. Co., 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82.

<sup>95</sup> City of Philadelphia v. Empire P. Ry. Co., 7 Phila. (Pa.) 321.

<sup>96</sup> State v. Inhabitants of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; South Covington & C. St. Ry. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161.

<sup>97</sup> Commonwealth v. Brooks, 109 Mass. 355; Commonwealth v. Fenton, 139 Mass. 195, 29 N. E. 653.

<sup>98</sup> City of Bowling Green v. Carson, 10 Bush (Ky.) 64.

<sup>99</sup> City of St. Louis v. Weber, 44 Mo. 547.

*Same—Liquor Selling*

And, in regard to liquor selling, ordinances have been held valid which limit the licenses to one for each one thousand of population;<sup>1</sup> so of one which limits the district or precinct in which liquor may be sold;<sup>2</sup> which prohibits druggists from selling except from prescription;<sup>3</sup> which forbids license unless assented to by two-thirds of the freeholders within a radius of three miles,<sup>4</sup> or without the consent of the county officials;<sup>5</sup> so of one which requires closing of saloons at 9, 10, and 11 o'clock at night, respectively,<sup>6</sup> and from 10:30 to 5:00 a. m.,<sup>7</sup> and from midnight to 5:00 a. m.<sup>8</sup>

*Same—Sanitary and Police*

So also ordinances have been sustained which require lot owners to clean the snow from the sidewalk;<sup>9</sup> that require restaurants to close at 10 o'clock at night;<sup>10</sup> that require keepers of hotels, restaurants, and boarding houses to report the names of lodgers or boarders, and pawnbrokers to report property received, and description of persons delivering the same,<sup>11</sup> and which prohibit them from purchasing the articles

<sup>1</sup> Decie v. Brown, 167 Mass. 290, 45 N. E. 765.

<sup>2</sup> In re WILSON, 32 Minn. 145, 19 N. W. 723, Cooley, Cas. Mun. Corp. 116, 349; State v. Clark, 28 N. H. 176, 61 Am. Dec. 611.

<sup>3</sup> Provo City v. Shurtliff, 4 Utah, 15, 5 Pac. 302.

<sup>4</sup> Metcalf v. State, 76 Ga. 308.

<sup>5</sup> State v. Hellman, 56 Conn. 190, 14 Atl. 806; Wagner v. Town of Garrett, 118 Ind. 114, 20 N. E. 706.

<sup>6</sup> Smith v. Mayor, etc., of City of Knoxville, 3 Head (Tenn.) 245; Staates v. Inhabitants of Borough of Washington, 44 N. J. Law, 605, 43 Am. Rep. 402; Decker v. Sergeant, 125 Ind. 404, 25 N. E. 458.

<sup>7</sup> State v. Welch, 36 Conn. 215.

<sup>8</sup> Brighton v. Toronto, 12 U. C. 433.

<sup>9</sup> Goddard's Case, 16 Pick. (Mass.) 504, 28 Am. Dec. 259. Contra, Gridley v. City of Bloomington, 88 Ill. 554, 30 Am. Rep. 566; City of Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640. See, also, Flynn v. Canton Co. of Baltimore, 40 Md. 312, 17 Am. Rep. 603.

<sup>10</sup> State v. Freeman, 38 N. H. 426.

<sup>11</sup> City of Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593; Kansas City v. Garnier, 57 Kan. 412, 46 Pac. 707. See City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472.

pawned.<sup>12</sup> Also ordinances requiring garbage to be removed in a closed vehicle labeled "Garbage";<sup>13</sup> and one requiring a lot owner to remove filth from a private way adjoining his land;<sup>14</sup> also one cutting off gas and water from consumers delinquent for 10 days,<sup>15</sup> have been held to be reasonable.

#### *Same—Discordant Rulings*

It will be noted from the foregoing cases that the decisions are not harmonious on this topic. What is reasonable in one city is unreasonable in another; and what seems reasonable to one court appears unreasonable to another, the decisions varying no doubt in accordance with the character of the city, the usages of the locality, the civic and municipal standards of the population, and the temperament of the judges. Recent and present tendencies are obviously towards stricter regulation and stronger presumption of the reasonableness of ordinances.

#### *Partial Invalidity*

An ordinance may be valid in part and void in part, and the valid part may be carried into effect, if what remains after the invalid part is eliminated contains the essential elements of a valid ordinance.<sup>16</sup> Thus, when an ordinance creates two

<sup>12</sup> Kuhn v. City of Chicago, 30 Ill. App. 203.

<sup>13</sup> People v. Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524; City of Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269.

<sup>14</sup> Commonwealth v. Cutter, 156 Mass. 52, 29 N. E. 1146.

<sup>15</sup> Commonwealth v. City of Philadelphia, 132 Pa. 288, 19 Atl. 136.

<sup>16</sup> Johnson v. Common Council of City of Bessemer, 143 Mich. 313, 106 N. W. 852; State v. Robb, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; City of Eureka v. Wilson, 15 Utah, 67, 48 Pac. 150, 62 Am. St. Rep. 904; CITY OF DULUTH v. KRUPP, 46 Minn. 435. 49 N. W. 235, Cooley, Cas. Mun. Corp. 250; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Wilcox v. Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; State ex rel. Hahn v. Hardy, 7 Neb. 377; Pennsylvania R. Co. v. Mayor, etc., of Jersey City, 47 N. J. Law, 286; Second Municipality of New Orleans v. Morgan, 1 La. Ann. 111; City of Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Canova v. Williams, 41 Fla. 509, 27 South. 30; Ex parte Bizzell, 112 Ala. 210, 21 South. 371.

Where one part of an ordinance is void, and another part valid,

or more offenses that are severable, and some of its provisions are invalid, those which are valid may be enforced.<sup>17</sup> If, however, the ordinance is entire, so that each part has a general influence over the rest, and a particular provision is void, the entire ordinance will be so declared.<sup>18</sup> An ordinance may, too, be valid as to certain persons or things and invalid as to others.<sup>19</sup>

### FINES AND PENALTIES

52. A penalty is an essential part of an ordinance, and a corporation having authority to enact an ordinance has the implied power to impose a fine as a penalty; but the power of imprisonment or forfeiture must be expressly conferred by the Legislature upon the municipality.

This doctrine of the common law has been generally recognized and enforced by the courts in America, but further than

the void part cannot have the effect to render the whole ordinance void. *Imes v. Chicago, B. & Q. R. Co.*, 105 Ill. App. 37. Where the invalid provisions of an ordinance can be eliminated without affecting the remainder, it will not be invalid in toto. *McNulty v. Toof*, 116 Ky. 202, 75 S. W. 258, 25 Ky. Law Rep. 430. But where an ordinance is invalid in part, and such part is so commingled with the valid portion as to make separation impossible, it is fatally defective. *Town of Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 68 S. W. 761.

<sup>17</sup> *Ex parte Bizzell*, 112 Ala. 210, 21 South. 371. Where the first section of an ordinance defines the offense of drunkenness and provides a penalty therefor, it may be sustained to that extent, though a second section is invalid, in that it provides that a village justice may, in his discretion, require the one convicted to give bail to keep the peace. *Village of Wykoff v. Healey*, 57 Minn. 14, 58 N. W. 685.

<sup>18</sup> *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; *Attorney General v. Lowell*, 67 N. H. 198, 38 Atl. 270. As when an ordinance imposing an occupation tax provides an illegal method of enforcement. *City of Omaha v. Harmon*, 58 Neb. 339, 78 N. W. 623.

<sup>19</sup> *Kettering v. City of Jacksonville*, 50 Ill. 39; *Ex parte Cowert*, 92 Ala. 94, 9 South. 225. See *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

this the decisions are not in harmony, except that the fine may be recovered by a civil action.<sup>20</sup> The statutes of the various states are not uniform, and it is difficult to formulate any general rules in regard to the penalty of an ordinance.

### *Imprisonment and Forfeiture*

Whether imprisonment may be used as a means of coercing payment of a fine, whether labor may be imposed as part of the sentence, whether the costs stand upon the same basis with fines, are questions on which the courts do not agree; but there seems to be general concurrence in the view that imprisonment for nonpayment of a fine, though recovered in an action for debt, is not imprisonment for debt;<sup>21</sup> and also that costs and fines stand upon the same basis.<sup>22</sup> It has likewise been generally held that the particular penalty imposed must be expressly authorized by the Legislature or it will be void; and that consequently, under a statute authorizing fine or imprisonment, imprisonment could not be used to enforce payment of a fine;<sup>23</sup> nor could forfeiture be adjudged as a penalty without due notice or process.<sup>24</sup> Some courts hold that

<sup>20</sup> Coates v. City of New York, 7 Cow. (N. Y.) 585; Ewbanks v. President, etc., of Town of Ashley, 36 Ill. 178; In re Jones, 90 Mo. App. 318; City of De Soto v. Brown, 44 Mo. App. 148; In re Miller, 44 Mo. App. 125.

<sup>21</sup> Hardenbrook v. Town of Ligonier, 95 Ind. 70; Caldwell v. State, 55 Ala. 133; Hibbard v. Clark, 56 N. H. 155, 22 Am. Rep. 442; In re Miller, 44 Mo. App. 125.

<sup>22</sup> Horr & B. Mun. Ord. § 203. Contra, State v. Cantieny, 34 Minn. 1, 24 N. W. 458.

<sup>23</sup> Brieswick v. Mayor, etc., of City of Brunswick, 51 Ga. 639, 21 Am. Rep. 240. See Ex parte Rosenheim, 83 Cal. 390, 23 Pac. 372; Ex parte Green, 94 Cal. 387, 29 Pac. 783; Ex parte Smith (Cal.) 29 Pac. 785. Also Lewis v. Forehand, 117 Ga. 798, 45 S. E. 68.

<sup>24</sup> Rose v. Hardie, 98 N. C. 44, 4 S. E. 41; Ft. Smith v. Dodson, 46 Ark. 296, 55 Am. Rep. 589; Donovan v. Mayor, etc., of City of Vicksburg, 29 Miss. 247, 64 Am. Dec. 143; Gosselink v. Campbell, 4 Iowa, 296; Moore v. State, 11 Lea (Tenn.) 35; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301; Hanscom v. Burmoor, 35 Neb. 504, 53 N. W. 371; Spitzer v. Young, 63 Mo. 42; Gilchrist v. Schmidling, 12 Kan. 263; McKee v. McKee, 8 B. Mon. (Ky.) 433; Bowers v. Horen, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513. That

a fine must be fixed in amount by the terms of the ordinance,<sup>25</sup> while others have sustained as valid an ordinance giving the court some measure of discretion.<sup>26</sup>

## PROCEDURE

53. The nature and form of complaint, evidence, and trial for violation of municipal ordinances are so varied in the several states by constitutions, statutes, and decisions therein as to be regarded as matters of local rather than of general law, and therefore are not susceptible of general statement and treatment.

In some states these proceedings are regarded as civil, in others criminal, and in others they are mixed. Recent authors,<sup>27</sup> in a treatise oft-quoted with reference to the nature of this proceeding, have classified the states as follows: (1) Criminal: California,<sup>28</sup> Massachusetts,<sup>29</sup> Maine,<sup>30</sup> Nebras-

part of an ordinance which provides that a city street commissioner may sell a vessel or its loading, which, having been sunk in the channel of the river within the city's jurisdiction, is removed as an obstruction, is invalid as being in excess of the amount named in the act permitting the city to enforce its ordinances by fines and penalties, as it creates a forfeiture. *Coonley v. City of Albany*, 132 N. Y. 145, 30 N. E. 382.

<sup>25</sup> *State v. Worth*, 95 N. C. 615; *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; *Slocum v. Ocean Grove Camp Meeting Ass'n*, 59 N. J. Law, 110, 35 Atl. 794; *Bowman v. St. John*, 43 Ill. 337. See, also, *Landis v. Borough of Vineland*, 54 N. J. Law, 75, 23 Atl. 357.

<sup>26</sup> *Atkins v. Phillips*, 26 Fla. 281, 8 South. 429, 10 L. R. A. 158; *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; *Town of Huntsville v. Phelps*, 27 Ala. 55; *State v. Cainan*, 94 N. C. 880; *City of Keokuk v. Dressell*, 47 Iowa, 597; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Carpenter*, 60 Conn. 97, 22 Atl. 497.

<sup>27</sup> *Horr & B. Mun. Ord.* § 170.

<sup>28</sup> *City of Santa Barbara v. Sherman*, 61 Cal. 57.

<sup>29</sup> *In re Goddard*, 16 Pick. (Mass.) 504, 28 Am. Dec. 259.

<sup>30</sup> *O'Malia v. Wentworth*, 65 Me. 129.

ka,<sup>31</sup> New Hampshire.<sup>32</sup> (2) Civil: Colorado,<sup>33</sup> Georgia,<sup>34</sup> New Jersey,<sup>35</sup> Wisconsin,<sup>36</sup> Wyoming.<sup>37</sup> (3) In some cases criminal and others civil: Alabama,<sup>38</sup> Ohio,<sup>39</sup> Kansas,<sup>40</sup> Tennessee.<sup>41</sup> (4) In the following states appears to be assumed a mesne position: Illinois,<sup>42</sup> Indiana,<sup>43</sup> Iowa,<sup>44</sup> Michigan,<sup>45</sup> Minnesota,<sup>46</sup> Missouri,<sup>47</sup> New York.<sup>48</sup> In the first class formal complaint under oath is necessary, and any pleadings required must be formal and particular;<sup>49</sup> in the second class the liberty of civil procedure prevails;<sup>50</sup> in the third class the procedure is dependent upon the nature of the particular case; and in the fourth class, without specifying the degree of particularity, the courts declare that criminal rules need not be followed, but the proceeding is necessarily stricter than in civil cases.<sup>51</sup> Careful attention will disclose discord not

<sup>31</sup> City of Brownville v. Cook, 4 Neb. 101.

<sup>32</sup> State v. Stearns, 31 N. H. 106.

<sup>33</sup> McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

<sup>34</sup> Williams v. City Council of Augusta, 4 Ga. 509; Floyd v. Commissioners of Town of Eatonton, 14 Ga. 354, 58 Am. Dec. 559.

<sup>35</sup> Brophy v. City of Perth Amboy, 44 N. J. Law, 217.

<sup>36</sup> City of Oshkosh v. Schwartz, 55 Wis. 483, 13 N. W. 553.

<sup>37</sup> Jenkins v. City of Cheyenne, 1 Wyo. 287.

<sup>38</sup> Mayor, etc., of City of Mobile v. Jones, 42 Ala. 630

<sup>39</sup> Larney v. City of Cleveland, 34 Ohio St. 599.

<sup>40</sup> Neitzel v. City of Concordia, 14 Kan. 446.

<sup>41</sup> Theilan v. Porter, 14 Lea, 622, 52 Am. Rep. 173; Mayor, etc., of Town of Bristol v. Burrow, 5 Lea, 128.

<sup>42</sup> Town of Lewiston v. Proctor, 23 Ill. 533.

<sup>43</sup> Miller v. O'Reiley, 84 Ind. 168.

<sup>44</sup> City of Davenport v. Bird, 34 Iowa, 524.

<sup>45</sup> Cooper v. People, 41 Mich. 403, 2 N. W. 51.

<sup>46</sup> State v. Lee, 29 Minn. 445, 13 N. W. 913.

<sup>47</sup> City of St. Louis v. Vert, 84 Mo. 204.

<sup>48</sup> Wood v. City of Brooklyn, 14 Barb. 425.

<sup>49</sup> Campbell v. Thompson, 16 Me. 117; Kansas City v. Flanagan, 69 Mo. 22.

<sup>50</sup> Keeler v. Milledge, 24 N. J. Law, 142; Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414.

<sup>51</sup> Furhman v. Mayor, etc., of City of Huntsville, 54 Ala. 263; City of Goshen v. Croxton, 34 Ind. 239; City of Emporia v. Volmer, 12 Kan. 622.

only between the decisions of different states, but even in those of the same states, so as to unsettle the classification of those given above.

### *Jury Trial*

The much-mooted question of trial by jury in these cases has been variously decided. The general rule is undoubtedly that, when the act charged is merely a violation of a city ordinance and not an offense criminal under the general law, trial by jury is not a right of the defendant.<sup>52</sup> The decisions generally agree in the doctrine that the proceeding is valid if the accused may obtain a jury trial on appeal without oppressive restrictions.<sup>53</sup>

### *Proof of Ordinance*

There is a general concurrence of decisions that the municipal courts will take judicial notice of all municipal ordinances, but that in other courts ordinances must be duly proven.<sup>54</sup> Some of the cases have gone to the extent of holding that the original record must be produced, and due enactment of the ordinance proved therefrom;<sup>55</sup> others hold that its due enactment will be presumed from its being recorded among the municipal ordinances, and that a certified copy is sufficient;<sup>56</sup>

<sup>52</sup> City of St. Louis v. Fischer, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679, 99 Am. St. Rep. 614, affirmed in 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; In re Kinsel, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475.

<sup>53</sup> Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

<sup>54</sup> Shanfelter v. City of Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648; Munson v. Fenno, 87 Ill. App. 655; City of St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; Watt v. Jones, 60 Kan. 201, 56 Pac. 16.

<sup>55</sup> Lindsay v. City of Chicago, 115 Ill. 120, 3 N. E. 443; City of Ottumwa v. Schaub, 52 Iowa, 515, 3 N. W. 529; City of Independence v. Trouvalle, 15 Kan. 70; Town of Tipton v. Norman, 72 Mo. 380.

<sup>56</sup> McChesney v. City of Chicago, 159 Ill. 223, 42 N. E. 894; Bailey v. State, 30 Neb. 855, 47 N. W. 208.

while others apply to municipal ordinances the rule of state laws, and hold that an ordinance may be proved by the production of a printed pamphlet or volume containing the same, purporting to be published by authority.<sup>57</sup>

#### *Courts—Jurisdiction*

When the charter or statute provides that a certain court shall have jurisdiction of violations of municipal ordinances, this jurisdiction is usually held exclusive.<sup>58</sup> Such jurisdiction is generally given to the municipal court, whether held by mayor, recorder, or police judge or justice, and the action or prosecution is usually brought in the name of the municipality;<sup>59</sup> but in some states it is brought in the name of the state.<sup>60</sup> If no court is named as having jurisdiction, the ordinances are not thereby rendered nugatory, but the action may be brought in the court having general jurisdiction.

#### *Twice in Jeopardy*

When the same act is made an offense both by statute and ordinance, it has been held that it is a breach of the constitutional provision against putting a citizen twice in jeopardy for the same act to prosecute and punish the offender under both laws, and that a conviction under either may be pleaded in bar of the prosecution under the other.<sup>61</sup> But the weight of authority is opposed to this holding, upon the rather specious

<sup>57</sup> Chicago & A. Ry. Co. v. Winters, 65 Ill. App. 435; Napman v. People, 19 Mich. 352; St. Louis v. St. Louis R. Co., 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82; City of Rutherford v. Swink, 90 Tenn. 152, 16 S. W. 76; Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 370, 19 S. W. 1053.

<sup>58</sup> Horr & B. Mun. Ord. § 166.

<sup>59</sup> 1 Dill. Mun. Corp. §§ 427 (note 1), 429.

<sup>60</sup> North Dakota; Washington.

<sup>61</sup> State v. Cowan, 29 Mo. 330; City of Corvallis v. Carlile, 10 Or. 139, 45 Am. Rep. 134; State v. Welch, 36 Conn. 215; State v. Flint, 63 Conn. 248, 28 Atl. 28; Menken v. City of Atlanta, 78 Ga. 668, 2 S. E. 559; Slaughter v. People, 2 Doug. (Mich.) 334, note; State v. Keith, 94 N. C. 933.

distinction that one prosecution is for the violation of the state law and the other for breach of the municipal ordinance only, and therefore quasi criminal.<sup>62</sup>

<sup>62</sup> Town of Bloomfield v. Trimble, 54 Iowa, 399, 6 N. W. 586, 37 Am. Rep. 212; City of St. Louis v. Bentz, 11 Mo. 61; Hankins v. People, 106 Ill. 628; State v. Taylor, 133 N. C. 755, 46 S. E. 5; State v. Muir, 86 Mo. App. 642; Black v. State, 144 Ala. 92, 40 South. 611; Ex parte Simmons, 4 Okl. Cr. 662, 112 Pac. 951; Id., 5 Okl. Cr. 399, 115 Pac. 380; State v. Oleson, 26 Minn. 507, 5 N. W. 959; Blatchley v. Moser, 15 Wend. (N. Y.) 215; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; McRae v. Mayor, etc., of City of Americus, 59 Ga. 168, 27 Am. Rep. 390; Riley v. City of Trenton, 51 N. J. Law, 498, 18 Atl. 116, 5 L. R. A. 352; City of Indianapolis v. Huegele, 115 Ind. 581, 18 N. E. 172.

COOL.MUN.CORP.—13

## CHAPTER VII

### OFFICERS, AGENTS, AND EMPLOYÉS

54. In General.
55. Officers, Governmental and Municipal.
56. Eligibility.
57. Appointment and Election.
58. Term of Office.
59. Officers De Facto.
60. Title to Office.
61. Salary.
62. Resignation.
63. Removal.
64. Judicial Control.
65. Personal Liability—Contracts.
66. Same—Torts.
67. Same—Reimbursement of Municipality for Loss.
68. Agents.
69. Employés.

#### IN GENERAL

54. A municipal officer is one who holds for a time a permanent municipal position of trust and responsibility, with definite municipal powers, duties, and privileges.

A municipal agent is one employed and intrusted by a municipality with discretionary power to represent it in dealings with third persons.

A municipal employé is one engaged in the service of the municipality.

All officers of a municipal corporation, including aldermen, occupy a fiduciary relation towards the public, and must act solely with reference to the best interests of the community.

At common law an office was defined to be "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public or pri-

vate."<sup>1</sup> But in America "public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare."<sup>2</sup> Right they may have to fees and emoluments; but these are purely incidental to the office they hold, the controlling idea being not the right of the officers, but the welfare of the public whose servants they are.<sup>3</sup> The office endures; the officer is temporary. His term is usually fixed by law, and for a certain period. The law also defines the scope of his powers, duties, and privileges, and thus endows him with a portion of the governmental authority.<sup>4</sup> He is not master, but servant, of

<sup>1</sup> 2 Bl. Comm. p. 36.

<sup>2</sup> Field, C. J., in *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *Grieb v. Syracuse*, 94 App. Div. 133, 87 N. Y. Supp. 1083; *United States ex rel. Crawford v. Addison*, 6 Wall. (U. S.) 291, 18 L. Ed. 919; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372; *Livaudais v. Municipality No. 2*, 16 La. 509; *Burns v. Mayor*, etc., of City of New York, 3 Hun (N. Y.) 212, 5 Thomp. & C. 371; *State ex rel. v. Kiichli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; *Clark v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325; *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87; *Cooley, Const. Lim.* (6th Ed.) p. 331.

<sup>3</sup> *Hendricks v. State ex rel. Eckford*, 20 Tex. Civ. App. 178, 49 S. W. 705; *Grieb v. Syracuse*, 94 App. Div. 133, 87 N. Y. Supp. 1083; *Commonwealth v. Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *Bowers v. Bowers*, 26 Pa. 74, 67 Am. Dec. 398; *People ex rel. Madden v. Stratton*, 28 Cal. 382. In the absence of law, ordinance or express contract, he is not entitled to compensation. *Bosworth v. City of New Orleans*, 26 La. Ann. 494; *Haswell v. Mayor*, etc., of New York, 9 Daly (N. Y.) 1; *Id.*, 81 N. Y. 255; *Blackburn v. Oklahoma City*, 1 Okl. 292, 31 Pac. 782, 33 Pac. 708.

<sup>4</sup> *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *Attorney General v. Drohan*, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301; *McCormick v. Thatcher*, 8 Utah, 294, 30 Pac. 1091, 17 L. R. A. 243; *Burns v. Mayor*, etc., of City of New York, 3 Hun (N. Y.) 212; *Doyle v. Alderman of Raleigh*, 89 N. C. 133, 45 Am. Rep. 677; *State ex rel. Platt v. Kirk*, 44 Ind.

the law—the common sovereign of all. His duties may be ministerial only, though usually they call for the exercise of discretion within the limited scope of his powers. He is appointed or elected by the municipality to exercise its functions in dealing with the citizen. His position, therefore, is a place of high trust and responsibility, whether he be mayor or alderman, recorder, or police officer.

#### *Agents*

An agent also holds a position of like trust, responsibility, and discretion. His relation is fiduciary, and he may contract with third persons in the name of the corporation, and in matters committed to him may create corporate obligations; but he is distinguished from an officer in the fact that his position is not permanent, but temporary, and for a special object.<sup>5</sup> When the service is performed, the relation ceases; the agency begins and ends with the special business. The duration of the agency is indefinite, but it usually terminates with the completion of the special business committed to it. If the agency becomes permanent, it then is called an office.

#### *Employés*

“Employé” is used to describe one occupying a permanent position and performing a continuing service, so that, just as in an office, when one person goes out of the place another goes in. But the duties and services are purely ministerial; the employé is not clothed with discretion, and has no power

401, 15 Am. Rep. 239; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Sheboygan County v. Parker, 3 Wall. (U. S.) 98, 18 L. Ed. 33; Prather v. City of Lexington, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585.

<sup>5</sup> Barnes v. City of Philadelphia, 3 Phila. (Pa.) 409; Egan v. City of St. Paul, 57 Minn. 1, 58 N. W. 267; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; Baldwin v. School City of Logansport, 73 Ind. 346; Davis v. City of Philadelphia, 3 Phila. (Pa.) 374; Detroit Free Press Co. v. State Auditor, 47 Mich. 135, 10 N. W. 171; In re Newport Charter, 14 R. I. 655; Sanford v. Boyd, 2 Cranch (C. C.) 79, Fed. Cas. No. 12,311; Travelers' Ins. Co. v. Township of Oswego, 59 Fed. 58, 7 C. C. A. 669; United States v. Hartwell, 6 Wall. (U. S.) 385, 18 L. Ed. 830; Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

to represent or bind the employer.<sup>6</sup> These general rules furnish a guide for distinguishing various persons by which the corporation acts and operates, but it is not always easy to discriminate between them and determine just where each person belongs.

#### *Fiduciary Relations*

All officers of a municipal corporation, including aldermen, occupy a fiduciary relation toward the public, and must act solely with reference to the best interests of the community. Like the Gospel, so the law declares that no man can serve two masters; therefore one who takes upon himself a public office must not use it for self-service.<sup>7</sup> In all matters affecting the public his knowledge and skill are devoted to it, and may not be used to the detriment of the corporation.<sup>8</sup> So it has been held that if an officer, whose duty it is to select a lot for the use of the city, procure the purchase, though beforehand by an agent, and sell the same at an advanced price to the city, he must account to the city for the profit made thereby.<sup>9</sup> The agent also is liable if he participate knowingly in the transaction.<sup>10</sup> An officer may not contract with himself on behalf of the city, for it requires two to make a valid contract.<sup>11</sup> Nor can a member of a city board vote upon any contract with the city in which he is personally interested;<sup>12</sup> but it is gen-

<sup>6</sup> Fletcher v. City of Lowell, 15 Gray (Mass.) 103; Shanley v. City of Brooklyn, 30 Hun (N. Y.) 396; Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

<sup>7</sup> Goodrich v. City of Waterville, 88 Me. 39, 33 Atl. 659; 1 Dill. Mun. Corp. § 444.

<sup>8</sup> Nunemacher v. City of Louisville, 98 Ky. 334, 32 S. W. 1091.

<sup>9</sup> Short v. Symmes, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

<sup>10</sup> Short v. Symmes, *supra*.

<sup>11</sup> City of Ft. Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127; Drake v. Elizabeth, 69 N. J. Law, 190, 54 Atl. 248; O'Neil v. Flanagan, 98 Me. 426, 57 Atl. 591; Santa Ana Water Co. v. Town of San Buenaventura (C. C.) 65 Fed. 323; McElhinney v. City of Superior, 32 Neb. 744, 49 N. W. 705; Holderness v. Baker, 44 N. H. 414; Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242.

<sup>12</sup> Berlin Iron Bridge Co. v. City of San Antonio (C. C.) 62 Fed.

erally ruled that holding a municipal office is no disqualification to contracting with a municipality, provided it is represented in the transaction by other officers.<sup>13</sup>

## OFFICERS, GOVERNMENTAL AND MUNICIPAL

55. The officers of a municipality corresponding to its powers are of two classes, governmental and municipal.

The difficulty of distinguishing between governmental and municipal functions, hereinbefore discussed,<sup>14</sup> exists also as to the officers of the corporation. The police department and all its officers are generally held to be state officers, as distinguished from municipal.<sup>15</sup> City comptrollers, treasurers, and

882; *Foster v. City of Cape May*, 60 N. J. Law, 78, 36 Atl. 1089; *Rider v. City of Portsmouth*, 67 N. H. 298, 38 Atl. 385; *West Jersey Traction Co. v. Board of Public Works of City of Camden*, 56 N. J. Law, 431, 29 Atl. 163; *Stone v. Bevans*, 88 Minn. 127, 92 N. W. 520, 97 Am. St. Rep. 506; *Jolly v. Railroad Co.*, 25 Pittsb. Leg. J. (N. S. Pa.) 259; *Duncan v. City of Charleston*, 60 S. C. 532, 39 S. E. 265; *City of Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204; *Woods v. Potter*, 8 Cal. App. 41, 95 Pac. 1125.

<sup>13</sup> *McBride v. Grand Rapids*, 47 Mich. 236, 10 N. W. 353; *Mayor, etc., of Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Board of Com'rs of Tippecanoe County v. Mitchell*, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520; *United States v. Brindle*, 110 U. S. 688, 4 Sup. Ct. 180, 28 L. Ed. 286.

<sup>14</sup> *Ante*, § 24.

<sup>15</sup> *Yaple v. Morgan*, 2 Ohio Cir. Ct. R. 406; *Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127; *Perkins v. City of New Haven*, 53 Conn. 214, 1 Atl. 825; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Dec. 640; *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; *Kimball v. City of Boston*, 1 Allen (Mass.) 417; *State v. Seavey*, 22 Neb. 454, 35 N. W. 228; *Rusher v. City of Dallas*, 83 Tex. 151, 18 S. W. 333; *State v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Culver v. City of Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; *Borough of Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771.

There are some rulings to the contrary in New York (*Shanley v. City of Brooklyn*, 30 Hun, 396; *Mangam v. City of Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 705; *People v. Albertson*, 55 N. Y. 50) and Ken-

auditors are obviously municipal officers.<sup>16</sup> So, likewise, the firemen and members of the fire department have been declared to be municipal rather than public.<sup>17</sup> Those officers engaged in the administration of justice, preservation of the public peace, and the like, are state officers, while those enforcing the municipal by-laws, and attending to the gasworks, waterworks, sewers, and other municipal agencies, are usually held to be municipal officers.<sup>18</sup> The mayor has been held to be, in Missouri,<sup>19</sup> a municipal officer, and in Michigan<sup>20</sup> a state officer; but it is believed that the former accords with the general current of decisions, as it does with the reason

tucky (*Speed v. Crawford*, 3 Metc. 207, where it was held that members of the police board were "officers for cities and towns," within the provision of Const. art. 6, par. 6).

<sup>16</sup> *Stevenson v. Bay City*, 26 Mich. 44; *People v. Neilson*, 48 How. Prac. (N. Y.) 454; *Rissing v. City of Ft. Wayne*, 137 Ind. 427, 37 N. E. 328; *City of Ballard v. Keane*, 13 Wash. 201, 43 Pac. 27; *Morse v. City of Lowell*, 7 Metc. (Mass.) 152; *State v. Brandt*, 41 Iowa, 593; *State v. Walton*, 62 Me. 106; *Jenkins v. City of Scranton*, 202 Pa. 267, 51 Atl. 994; *Brown v. Turner*, 70 N. C. 93; *Lorillard v. Town of Monroe*, 11 N. Y. 392, 62 Am. Dec. 120.

<sup>17</sup> *Miller v. Savannah Fire Co.*, 26 Ga. 678; *Henderson v. London & Lancashire Ins. Co.*, 135 Ind. 23, 34 N. E. 565, 20 L. R. A. 827, 41 Am. St. Rep. 410; *City of Savannah v. Grayson*, 104 Ga. 105, 30 S. E. 693; *People ex rel. Whitney v. Board of Delegates of San Francisco Fire Department*, 14 Cal. 479; *People v. Pinckney*, 32 N. Y. 377. But see *Lowry v. Lexington*, 113 Ky. 763, 68 S. W. 1109, 24 Ky. Law Rep. 516.

<sup>18</sup> *State of Ohio ex-rel. v. Mulvihill*, 9 Ohio Dec. 450; *Commonwealth v. Grant*, 2 Woodw. Dec. (Pa.) 379; *State ex rel. Cameron v. Shannon*, 133 Mo. 139, 33 S. W. 1137; *People v. Draper*, 15 N. Y. 532; *City of Chicago v. Wright*, 69 Ill. 326; *State ex rel. Saunders v. Kohnke*, 109 La. 838, 33 South. 793; *Ocorr & Rugg Co. v. City of Little Falls*, 77 App. Div. 592, 79 N. Y. Supp. 251; *Goud v. City of Portland*, 96 Me. 125, 51 Atl. 820; *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103, *Cooley, Cas. Mun. Corp.* 36; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640; *United States ex rel. Brown v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

<sup>19</sup> *Britton v. Steber*, 62 Mo. 370.

<sup>20</sup> *Attorney General ex rel. Moreland v. Common Council of City of Detroit*, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

of the law.<sup>21</sup> He, as the official head of the municipality, is specially identified with the local interests centering in the municipality.

The distinction between municipal and public officers has been considered important in Michigan,<sup>22</sup> Indiana,<sup>23</sup> and other states, in view of certain constitutional provisions reserving the right of local self-government to municipalities. In view of these provisions it was ruled in the two states named above that boards appointed by the Legislature, and specially empowered to perform certain acts for the municipality, were not officers of the municipality, and could make no contracts binding upon it.<sup>24</sup>

#### *Mayor*

The executive head of the municipality is the mayor. He is the official head of the municipality, the president of the corporation.<sup>25</sup> As already seen, he is generally a member of the governing body and presides over it *ex officio*.<sup>26</sup> But in the larger cities his functions are purely executive,<sup>27</sup> and the presiding officer is another person, either chosen by the mem-

<sup>21</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4; Speed v. Crawford, 3 Metc. (Ky.) 207; Goud v. City of Portland, 96 Me. 125, 51 Atl. 820.

<sup>22</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36.

<sup>23</sup> STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4.

<sup>24</sup> People ex rel. Board of Park Com'r's of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>25</sup> People v. Gregg, 59 Hun, 107, 13 N. Y. Supp. 114; People v. Wood, 4 Parker, Cr. R. (N. Y.) 144; Elliott, Mun. Corp. § 271. Under the Constitution the mayor is the chief executive officer of a city, and, as such, is authorized to supervise the other officers thereof in the execution of their duties. Burch v. Hardwicke, 23 Grat. (Va.) 51.

<sup>26</sup> See ante, § 45.

<sup>27</sup> Jacobs v. Board of Sup'r's of City & County of San Francisco, 100 Cal. 121, 34 Pac. 630; Cochran v. McCleary, 22 Iowa, 75.

bers from their own number, or elected by the voters of the corporation to that special office.<sup>28</sup> In those municipalities which are called by the name "borough," the executive head is called a burgess in Pennsylvania, and in Connecticut a warden. These correspond to the mayor of an ordinary municipality. These boroughs exist in three of the United States: Connecticut, Pennsylvania, and New Jersey, and formerly in Minnesota.

The powers and duties of the mayor depend on the provisions of the charter and the ordinances or by-laws passed in pursuance thereof.<sup>29</sup> He has generally the power of appointing such officers as are not elective,<sup>30</sup> and as chief executive is authorized to supervise the other officers of the municipality in the performance of their duties.<sup>31</sup>

#### *Aldermen*

In common parlance the aldermen or councilmen are spoken of as holding municipal offices, but this appellation finds little countenance in the law. These functionaries in a body constitute the legislative department of the municipality,<sup>32</sup> and have no separate individual powers or functions.<sup>33</sup> They re-

<sup>28</sup> *State ex rel. v. Kiichli*, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779.

<sup>29</sup> *City of Galveston v. Huches* (Tex. Civ. App.) 76 S. W. 214. An ordinance cannot confer on the mayor greater power than is given by the charter. *Union Depot & Railroad Co. v. Smith*, 16 Colo. 361, 27 Pac. 329.

<sup>30</sup> *O'Brien v. Thorogood*, 162 Mass. 598, 39 N. E. 287; *Bakely v. Nowrey*, 68 N. J. Law, 95, 52 Atl. 289; *Armstrong v. Whitehead*, 67 N. J. Law, 405, 51 Atl. 472; *Kip v. City of Buffalo* (Super. Ct.) 7 N. Y. Supp. 685; *O'Connor v. Walsh*, 83 App. Div. 179, 82 N. Y. Supp. 499.

<sup>31</sup> *Burch v. Hardwicke*, 23 Grat. (Va.) 51.

<sup>32</sup> *Central Bridge Corp. v. City of Lowell*, 15 Gray (Mass.) 106; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774. See, also, *State ex rel. Platt v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239.

<sup>33</sup> *State ex rel. Platt v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *McCortle v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758; *Dey v. Mayor, etc., of Jersey City*, 19 N. J. Eq. 412; *Mayor, etc., of Baltimore v. Poultney*, 25 Md. 18.

semble congressmen and legislators in the federal and state government, and these are seldom called officers. Yet in Rhode Island,<sup>34</sup> Connecticut,<sup>35</sup> and Oregon,<sup>36</sup> common councilmen have been held to be officers within the provisions of the Constitutions of those states, and in the two latter states they were held to be public officers.

#### *Departments and Boards*

The power to create departments, boards, and commissions charged with the performance of specified municipal duties is usually conferred by charter or statute on the larger cities.<sup>37</sup> Among the boards or departments thus created are those having control of the police, fire protection, water supply, public works, parks, public health, education, etc. These boards and departments are merely agencies of the municipality for carrying on the government of the city and are not themselves corporations,<sup>38</sup> unless the law creating them makes them so.<sup>39</sup>

<sup>34</sup> *In re Newport Charter*, 14 R. I. 655.

<sup>35</sup> *Garvie v. City of Hartford*, 54 Conn. 440, 7 Atl. 723.

<sup>36</sup> *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174.

See, also, as to aldermen, *City of Council Bluffs v. Waterman*, 86 Iowa, 688, 53 N. W. 289.

<sup>37</sup> *Newcomb v. City of Indianapolis*, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732; *Boehm v. Mayor*, etc., of City of Baltimore, 61 Md. 259; *Board of Councilmen of City of Frankfort v. Brawner*, 100 Ky. 166, 38 S. W. 497.

<sup>38</sup> *Brotherton v. Board of Police Com'rs of City of Baltimore*, 49 Md. 495; *Heller v. Stremmel*, 52 Mo. 309; *Appleton v. Water Com'rs of City of New York*, 2 Hill (N. Y.) 432; *Rauh v. Board of Com'rs of Department of Public Works*, 66 How. Prac. (N. Y.) 368; *Monfort v. Wheelock*, 78 Minn. 169, 80 N. W. 955; *Heard v. Commissioners of Charities of City of New York (Sup.)* 51 N. Y. Supp. 375; *Madden v. Kinney*, 116 Wis. 561, 93 N. W. 535.

<sup>39</sup> *Overseers of the Poor of City of Boston v. Sears*, 22 Pick. (Mass.) 122; *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450, 28 N. E. 679; *Whitehead v. Board of Education of City of Detroit*, 139 Mich. 490, 102 N. W. 1028; *Taylor v. Board of Health of City of Philadelphia*, 31 Pa. 73, 72 Am. Dec. 724.

## ELIGIBILITY

56. Qualifications for holding municipal offices are usually prescribed by the Constitution and general statutes of the state, but are often expressed in the charter of the corporation.

When qualifications are fixed by the Constitution, the Legislature cannot impose additional requirements either by charter or general law.<sup>40</sup> Neither can these be fixed by municipal ordinance,<sup>41</sup> nor can statutory qualifications be changed by ordinance.<sup>42</sup> Residence is generally a qualification;<sup>43</sup> but

<sup>40</sup> State ex rel. Fletcher v. Ruhe, 24 Nev. 251, 52 Pac. 274; City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. The Legislature cannot impose any general qualification which the Constitution does not require. Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

The Constitution of Oregon (article 2, § 2) provides that electors shall be male citizens, and also (article 6, § 8) that only electors shall be eligible to county offices. An act making women eligible to the office of superintendent of schools was held void, as violating the constitutional provision. State ex rel. v. Stevens, 29 Or. 464, 44 Pac. 898. But see State ex rel. Thompson v. McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343; Thomas v. Owens, 4 Md. 189.

<sup>41</sup> Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; Commonwealth v. Willis, 42 S. W. 1118, 19 Ky. Law Rep. 962.

<sup>42</sup> The city council has no power to add to the qualifications of city attorney as prescribed by charter. Commonwealth v. Willis, 42 S. W. 1118, 19 Ky. Law Rep. 962. See, also, Bowyer v. Camden, 50 N. J. Law, 87, 11 Atl. 137.

<sup>43</sup> Territory ex rel. Parker v. Smith, 3 Minn. 240 (Gil. 164), 74 Am. Dec. 749; State ex rel. Thomas v. Williams, 99 Mo. 291, 12 S. W. 905; Hill v. Anderson, 122 Ky. 87, 90 S. W. 1071; People v. Platt, 117 N. Y. 159, 22 N. E. 937; State ex rel. Attorney-General v. George, 23 Fla. 585, 3 South. 81; Jain v. Bossen, 27 Colo. 423, 62 Pac. 194; Dowty v. Pittwood, 23 Mont. 113, 57 Pac. 727.

Sound public policy requires that those who represent the local units of government shall themselves be component parts of such units, and this purpose can only be truly served by requiring such representatives to be and remain actual residents of the units which they represent, in contradistinction from constructive residents. People v. Ballhorn, 100 Ill. App. 571.

nonresidents have been held eligible to municipal office when residence is not prescribed by statute or charter.<sup>44</sup> Women, minors, and aliens are ineligible unless otherwise expressly provided by law.<sup>45</sup> A property qualification may also be prescribed by law.<sup>46</sup>

#### *Eligibility at Date of Election and of Taking Office*

Whether a candidate must be eligible at the date of election, or only at the date of induction into office, has been much mooted, and has produced conflicting decisions. In Indiana,<sup>47</sup> Wisconsin,<sup>48</sup> Iowa,<sup>49</sup> and Kansas<sup>50</sup> it has been ruled that any

<sup>44</sup> State ex rel. Hardwick v. Swearingen, 12 Ga. 23; Pettit v. Yewell, 113 Ky. 777, 68 S. W. 1075, 24 Ky. Law Rep. 565; Jones v. Mills, 11 Ill. App. 350.

<sup>45</sup> State ex rel. v. Stevens, 29 Or. 464, 44 Pac. 898; State ex rel. Attorney-General v. George, 23 Fla. 585, 3 South. 81; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; In re Robinson, 131 Mass. 376, 41 Am. Rep. 239. See, also, State v. Streukens, 60 Minn. 325, 62 N. W. 259; State ex rel. Perine v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397. But in the absence of provision as to qualifications of a deputy county clerk, a minor was held eligible to hold the office. Harkreader v. State, 35 Tex. Cr. R. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

Sometimes the charter provides that to hold office one must be a "legal voter." State v. McGahey, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446. Under a charter providing that all qualified voters shall be eligible to any municipal office, a qualified voter is eligible to the office of city attorney, though he has not been admitted to the bar as an attorney at law. State ex rel. Trebby v. Nichols, 83 Minn. 3, 85 N. W. 717.

<sup>46</sup> Darrow v. People, 8 Colo. 417, 8 Pac. 661. Where arrearages of taxes disqualifies, an alderman-elect may render himself eligible by payment of the same before assuming office. People v. Hamilton, 24 Ill. App. 609.

<sup>47</sup> Shuck v. State ex rel. Cope, 136 Ind. 63, 35 N. E. 993; Vogel v. State, 107 Ind. 374, 8 N. E. 164.

<sup>48</sup> State ex rel. Schuet v. Murray, 28 Wis. 96, 9 Am. Rep. 489; State v. Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512, where an alien who had not declared his intention to become a United States citizen at time of election was held competent to hold the office, the disability having been removed before the term of office began.

<sup>49</sup> State ex rel. Perine v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397.

<sup>50</sup> Privett v. Bickford, 26 Kan. 53, 40 Am. Rep. 301. See, also, as

person is eligible who can qualify himself to take and hold the office at the date of induction into it; and this is the rule with regard to members of Congress.<sup>51</sup> But the weight of judicial decision favors the doctrine that the candidate must be eligible at the date of his election.<sup>52</sup>

### APPOINTMENT AND ELECTION

57. The mode of selecting municipal officers is prescribed in the charter or the general law, and varies greatly in different states and in the several municipalities of the same state.

The mayor and members of the governing body are elected by the people;<sup>53</sup> but the treasurer, comptroller, marshal, attorney, and members of boards are chosen in some corporations by the people, and in others by the council.<sup>54</sup> Subor-

to Kentucky, Kirkpatrick v. Brownfield, 97 Ky. 558, 31 S. W. 137, 29 L. R. A. 703, 53 Am. St. Rep. 422.

<sup>51</sup> McCrary, Elect. § 311.

<sup>52</sup> State ex rel. Attorney General v. Page, 140 Mo. 501, 41 S. W. 963; State ex rel. Deering v. Berkeley, 140 Mo. 184, 41 S. W. 732; People v. Leonard, 73 Cal. 230, 14 Pac. 853; Drew v. Rodgers (Cal.) 34 Pac. 1081; State ex rel. Thomas v. Williams, 99 Mo. 291, 12 S. W. 905; Hill v. Washington Territory, 2 Wash. T. 147, 7 Pac. 63; State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N. W. 299; Carson v. McPhertridge, 15 Ind. 327; Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, 22 Am. St. Rep. 729.

<sup>53</sup> Elliott, Mun. Corp. § 259; Mayor, etc., of City of Monroe v. Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345.

<sup>54</sup> State ex rel. Renner v. Curry, 134 Ind. 133, 33 N. E. 685; Ball v. Fagg, 67 Mo. 481; State ex rel. Kane v. Johnson, 123 Mo. 43, 27 S. W. 399; Commonwealth v. Crogan, 7 Kulp (Pa.) 23; Sheridan v. Colvin, 78 Ill. 237; Greer v. City of Asheville, 114 N. C. 678, 19 S. E. 635; People v. Albertson, 55 N. Y. 50; Huey v. Jones, 140 Ala. 479, 37 South. 193; Rich v. McLaurin, 83 Miss. 95, 35 South. 337; Grant v. City of Alpena, 107 Mich. 335, 65 N. W. 230; Whipple v. Henderson, 13 Utah, 484, 45 Pac. 274; Armstrong v. Whitehead, 67 N. J. Law, 405, 51 Atl. 472. The Legislature may by statute confer upon the Governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class.

dinate officers are generally chosen by the council or appointed by the mayor; but the power of appointment is not here, as in England, an inherent executive function.<sup>55</sup> When, however, this power of appointment is conferred upon him, confirmation by the common council is not necessary unless expressly required;<sup>56</sup> but if required, it is essential to a valid appointment.<sup>57</sup> In elections by the common council the rule of majority obtains,<sup>58</sup> but in popular elections a plurality of votes is sufficient.<sup>59</sup>

#### *Condition Precedent*

Compliance with conditions precedent is essential to the lawful taking and holding of an office.<sup>60</sup> At common law a citizen was obliged to accept public office under penalty of indictment for refusal;<sup>61</sup> but in America public office is considered rather a distinction to be coveted than a burden to be

State ex rel. Kennedy v. Broatch, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477.

<sup>55</sup> Speed v. Common Council of City of Detroit, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555; Landes v. Walls, 160 Ind. 216, 66 N. E. 679; People ex rel. Waterman v. Freeman, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122; Fox v. McDonald, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98. In the absence of statutory authority, the city council cannot delegate to the mayor the power to appoint officers. Attorney General v. McCabe, 172 Mass. 417, 52 N. E. 717.

<sup>56</sup> State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

<sup>57</sup> Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743.

<sup>58</sup> LAWRENCE v. INGERSOLL, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870; Cooley, Cas. Mun. Corp. 149; Wheeler v. Commonwealth, 98 Ky. 59, 32 S. W. 259, 17 Ky. Law Rep. 636; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; Cadmus v. Farr, 47 N. J. Law, 208.

<sup>59</sup> Price v. Baker, 41 Ind. 572, 13 Am. Rep. 346; Brown v. Blake, 46 Conn. 549; Gulick v. New, 14 Ind. 93, 77 Am. Dec. 49. But see State v. Wilmington City Council, 3 Har. (Del.) 294.

<sup>60</sup> State ex rel. Childs v. Wadhams, 64 Minn. 318, 67 N. W. 64; State ex rel. Cronin v. Eshelby, 2 Ohio Cir. Ct. R. 468; People v. McKinney, 52 N. Y. 374; Vaughan v. Johnson, 77 Va. 300; Johnson v. Mann, 77 Va. 265.

<sup>61</sup> Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314.

borne. An office, however, must be accepted;<sup>62</sup> but formal acceptance is not necessary;<sup>63</sup> it may be implied from conduct.<sup>64</sup> Generally an oath of office, and oftentimes a bond, is a condition precedent to entering upon the duties thereof; and one cannot become an officer *de jure* until he has complied with these conditions.<sup>65</sup> But it has been held that failure to comply does not ipso facto create a vacancy, nor work a forfeiture of the right,<sup>66</sup> but that the officer may, after taking the office, comply with these conditions at any time before proceedings are instituted for his removal.<sup>67</sup>

#### *Civil Service*

Following the example set by Congress in 1883 in passing the Pendleton Act, New York in the same year, and Massa-

<sup>62</sup> Yet the common law is still recognized in the following American cases: *City of Waycross v. Youmans*, 85 Ga. 708, 11 S. E. 865; *United States v. Wright*, 1 McLean, 509, Fed. Cas. No. 16,775; *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17; *State ex rel. Toepke v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *London v. Headen*, 76 N. C. 72; *Haywood v. Wheeler*, 11 Johns. 432; *Edwards v. United States*, *supra*. See, also, *Cloutman v. Pike*, 7 N. H. 209.

<sup>63</sup> *Smith v. Moore*, 90 Ind. 294; *Coyne v. Rennie*, 97 Cal. 590, 32 Pac. 578.

<sup>64</sup> *Johnson v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *State ex rel. Kuhlman v. Rost*, 47 La. Ann. 53, 16 South. 776; *Hartford Tp. v. Bennett*, 10 Ohio St. 441.

<sup>65</sup> *People v. McKinney*, 52 N. Y. 374; *State ex rel. Egan v. Schram*, 82 Minn. 420, 85 N. W. 155; *Thompson v. Nicholson*, 12 Rob. (La.) 326; *Davis v. Berger*, 54 Mich. 652, 20 N. W. 629; *Olney v. Pearce*, 1 R. I. 292; *Hayter v. Benner*, 67 N. J. Law, 359, 52 Atl. 351; *Town of Tumwater v. Hardt*, 28 Wash. 684, 69 Pac. 378, 92 Am. St. Rep. 901; *State ex rel. Hull v. Gray*, 91 Mo. App. 438. But failure to take the prescribed oath will not prevent his becoming an officer *de facto*. *Rosell v. Board of Education of Neptune City*, 68 N. J. Law, 498, 53 Atl. 398.

<sup>66</sup> *State v. Ruff*, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140; *State ex rel. Heath v. Kraft*, 20 Or. 28, 23 Pac. 663. *Contra*, *Vaughan v. Johnson*, 77 Va. 300.

<sup>67</sup> *Launtz v. People ex rel. Sullivan*, 113 Ill. 137, 55 Am. Rep. 405; *Board of Com'rs of Knox County v. Johnson*, 124 Ind. 145, 24 N. E. 148, 7 L. R. A. 684, 19 Am. St. Rep. 88; *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681, and cases cited.

chusetts the year following, adopted civil service rules applicable to the state, and including the municipalities thereof; and, following these, civil service laws were passed by California, Connecticut, Illinois, Indiana, Louisiana, Ohio, Pennsylvania, Washington, Wisconsin, and some other states. These laws are not uniform in extent or provisions, but most of them are made applicable to municipalities. Some embrace most of the appointive officers, and some only employés, excepting confidential clerks and agents. Their purpose is to insure competency of officers and employés, especially the latter. For this purpose tests by examination are prescribed by a board of commissioners provided for in the law, and vested with wide discretion to frame rules and otherwise attend to the details of the law. They are vested with official discretion, but do not exercise judicial powers, and, whenever resisted in the performance of their functions, may call the courts to their assistance.<sup>68</sup> These acts have been challenged as unconstitutional by the dispensers of patronage and their beneficiaries, but have been generally, if not universally, sustained by the courts.<sup>69</sup>

Civil service regulation has been attempted in the so-called "Veteran Acts" of many of the states, giving preference of appointment to soldiers and sailors of the Civil War; but the courts have been averse to sustaining and enforcing these acts in municipalities, and commentators note the distinctions between municipal governments and federal and state governments in the matter of reward for military service.<sup>70</sup> These

<sup>68</sup> 2 Smith, *Pub. Corp.* §§ 1715, 1719.

<sup>69</sup> *Rogers v. Common Council of City of Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; *Kipley v. Luthardt*, 178 Ill. 525, 53 N. E. 74; *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793.

<sup>70</sup> *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 33 L. R. A. 253, 55 Am. St. Rep. 357; *Sullivan v. Gilroy*, 55 Hun, 285, 8 N. Y. Supp. 401; *Baker v. Delaney*, 55 N. J. Law, 9, 25 Atl. 936; *State ex rel. Cowden v. Miller*, 66 Minn. 90, 68 N. W. 732; *Schoolcraft's Adm'r v. Louisville & N. Railroad Co.*, 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579.

acts have, however, been sustained as constitutional in most cases where the question has been raised.<sup>71</sup> The enforcement of the civil service laws may be compelled by mandamus.<sup>72</sup>

### TERM OF OFFICE

**58. An officer elected or appointed for a definite term is entitled to remain in office until his successor is lawfully chosen and qualified.**

The commencement of the term of office of municipal officers and the duration thereof are usually provided for in the charter or general statutes. In the absence of any provision, the term would begin to run from the date of the appointment.<sup>73</sup> However, unless it is otherwise provided, an officer, though elected or appointed for a definite term, is entitled to remain in office until his successor is lawfully elected or appointed and has duly qualified.<sup>74</sup> This holding over is not prevented by a constitutional provision that "the General Assembly shall not create any office the tenure of which shall be

<sup>71</sup> People ex rel. Stratton v. Stratton, 174 N. Y. 531, 66 N. E. 1114; In re Sullivan, 55 Hun, 285, 8 N. Y. Supp. 401; Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357.

<sup>72</sup> Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809.

<sup>73</sup> Haight v. Love, 39 N. J. Law, 476, 23 Am. Rep. 234.

<sup>74</sup> City of Central v. Sears, 2 Colo. 588; State v. Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657; Scales v. Faulkner, 118 Ga. 152, 44 S. E. 987; State v. Wright, 56 Ohio St. 540, 47 N. E. 569; White v. Mayor, etc., of New York, 4 E. D. Smith, 563; People v. Ferris, 16 Hun (N. Y.) 219; De Lacey v. Brooklyn (City Ct. Brook.) 12 N. Y. Supp. 540; State v. Kearns, 47 Ohio St. 566, 25 N. E. 1027; State v. Wilson, 12 Lea (Tenn.) 247; City of Wheeling v. Black, 25 W. Va. 266; McMillin v. Richards, 45 Neb. 786, 64 N. W. 242; People ex rel. Drew v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; People ex rel. Ralston v. Herring, 30 Colo. 445, 71 Pac. 413; Territory ex rel. Jay v. Jacobs, 12 Okl. 152, 70 Pac. 197; Keen v. Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983; Wright v. Jacobs, 12 Okl. 138, 70 Pac. 193; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092; Johnson v. Mann, 77 Va. 265.

more than four years."<sup>75</sup> The incumbent holds over whenever there is a failure to elect his successor,<sup>76</sup> unless such failure is due to his own official negligence, in which case he is forbidden to profit by his own wrong.<sup>77</sup> In the former case, he is an officer *de jure*;<sup>78</sup> in the latter, he can be at most only an officer *de facto*, or better, *de son tort*.<sup>79</sup>

### OFFICERS DE FACTO

59. An officer *de facto* is one who, under claim of right or color of title, holds an office *de jure*, and performs the functions thereof with the acquiescence of the public.

A mere usurper or intruder is not an officer *de facto*.<sup>80</sup> He lacks the color of title and the public reputation and acquiescence essential to a *de facto* officer. Nor can one be a *de facto*

<sup>75</sup> State v. Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

<sup>76</sup> State v. Wilson, 12 Lea (Tenn.) 247; Petitioner Budlong, 15 R. I. 332, 5 Atl. 77; Lynch v. Lafland, 44 Tenn. (4 Cold.) 96; Lafferty v. Huffman, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203. *De facto* officers in possession of an office and discharging the duties were, as against persons having no right thereto, entitled to continue in office. Elliott v. Burke, 113 Ky. 479, 68 S. W. 445, 24 Ky. Law Rep. 292.

<sup>77</sup> People v. Bartlett, 6 Wend. (N. Y.) 422; Venable v. Curd, 2 Head (Tenn.) 584; Lynch v. Lafland, 4 Cold. (Tenn.) 96.

<sup>78</sup> Hale v. Bischoff, 53 Kan. 301, 36 Pac. 752; State v. Wilson, 12 Lea (Tenn.) 246; City of Wheeling v. Black, 25 W. Va. 266; Johnson v. Mann, 77 Va. 265; People v. Ferris, 16 Hun (N. Y.) 219; Walker v. Ferrill, 58 Ga. 512; Brady v. Howe, 50 Miss. 607.

<sup>79</sup> Lynch v. Lafland, 4 Cold. (Tenn.) 96.

<sup>80</sup> Keeler v. City of New Bern, 61 N. C. 505; Kempster v. City of Milwaukee, 97 Wis. 343, 75 N. W. 743; Town of Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574.

One assuming to perform the duties incident to a public office without attempting to qualify is without color of title and an usurper. Creighton v. Commonwealth, 83 Ky. 147, 4 Am. St. Rep. 143. See, also, Hamlin v. Kassafer, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; Dabney v. Hudson, 68 Miss. 292, 8 South. 545, 24 Am. St. Rep. 276.

officer unless he is actually holding an office de jure.<sup>81</sup> "Where no office legally exists, the pretended officer is merely an usurper, to whose acts no validity can be attached. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed, until in some regular mode prescribed by law their title is investigated and determined."<sup>82</sup> Their acts are therefore held valid on considerations of public policy and necessity, provided they are generally recognized by the public as holding the offices.<sup>83</sup> With regard to the constitutionality of the law under which an office is held, a distinction has been taken between the law creating the office and the one providing for the election. If

<sup>81</sup> People ex rel. Hoffman v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96; Hawver v. Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; People ex rel. Norfleet v. Staton, 73 N. C. 546, 21 Am. Rep. 479; In re Quinn, 152 N. Y. 89, 46 N. E. 175.

<sup>82</sup> Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Town of Decorah v. Bullis, 25 Iowa, 15; People v. White, 24 Wend. (N. Y.) 520; Kirker v. Cincinnati, 48 Ohio St. 507, 27 N. E. 898; Burt v. Winona & St. P. Railroad Co., 31 Minn. 472, 18 N. W. 285; Carleton v. People, 10 Mich. 250; ROCHE v. JONES, 87 Va. 484, 12 S. E. 965, Cooley, Cas. Mun. Corp. 114.

<sup>83</sup> Hawkins v. Intendant, etc., of Town of Jonesboro, 63 Ga. 527; State v. Gray, 23 Neb. 365, 36 N. W. 577; ROCHE v. JONES, supra; Dean v. Gleason, 16 Wis. 1; People v. Nostrand, 46 N. Y. 375; Yancy v. Town of Fairview (Ky.) 66 S. W. 636; Fulton v. Town of Andrea, 70 Minn. 445, 73 N. W. 256; Greene v. Village of Rienzi, 87 Miss. 463, 40 South. 17, 112 Am. St. Rep. 449; Akers v. Kolkmeyer, 97 Mo. App. 520, 71 S. W. 536; Brinkerhoff v. City of Jersey City, 64 N. J. Law, 225, 46 Atl. 170; Cochran v. McCleary, 22 Iowa, 75; Hamlin v. Kas-safer, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; State ex rel. Ry-lands v. Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653; Koontz v. Burgess, etc., of Hancock, 64 Md. 134, 20 Atl. 1039; State v. Lane, 16 R. I. 620, 18 Atl. 1035; OLIVER v. JERSEY CITY, 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228, Cooley, Cas. Mun. Corp. 154; Scovill v. City of Cleveland, 1 Ohio St. 126; Williams v. Inhabitants of School Dist. No. 1, in Lunenburg, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Lockhart v. City of Troy, 48 Ala. 579; Haskell v. Dutton, 65 Neb. 274, 91 N. W. 395.

the former is unconstitutional, there can be no de facto officer;<sup>84</sup> but there may be, if only the law providing for election to the office is declared unconstitutional.<sup>85</sup>

### TITLE TO OFFICE

**60. The title to an office cannot be tried or determined in a collateral proceeding, but only by direct contest.**

This rule applies only to officers de jure or de facto,<sup>86</sup> and will not prevent a party from showing that the alleged or pretended official action was taken by a mere usurper or intruder,<sup>87</sup> for in such instance the action is void. The mode of procedure for trying title to an office is usually prescribed by statute,<sup>88</sup> and in such proceeding a judgment of abatement and induction is rendered. When an incumbent suffers unlawful removal by the board of aldermen, the proper remedy is certiorari;<sup>89</sup> and the question of title of one in possession is properly tested not by mandamus, but by quo

<sup>84</sup> *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. But the acts of officers acting in an office created by an unconstitutional law are acts of de facto officers until the statute has been declared unconstitutional by competent judicial authority. *State ex rel. Strimple v. Bingham*, 14 Ohio Cir. Ct. R. 245, 7 O. C. D. 522.

<sup>85</sup> *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *People v. Terry*, 108 N. Y. 1, 14 N. E. 815.

<sup>86</sup> *Ex parte Moore*, 62 Ala. 471; *Carlisle v. City of Saginaw*, 84 Mich. 134, 47 N. W. 444; *People ex rel. Sinnott v. Trustees of Brooklyn Bridge*, 55 Hun, 606, 7 N. Y. Supp. 806; *Lee v. City of Wilmington*, 1 Marv. (Del.) 65, 40 Atl. 663; *Burt v. Winona & St. P. R. R. Co.*, 31 Minn. 472, 18 N. W. 285; *Landes v. Walls*, 160 Ind. 216, 66 N. E. 679.

<sup>87</sup> *United States v. Alexander* (D. C.) 46 Fed. 728.

<sup>88</sup> 1 *Dill. Mun. Corp.* §§ 202-205.

<sup>89</sup> *State v. Jersey City*, 54 N. J. Law, 310, 23 Atl. 666; *People v. Nichols*, 58 How. Prac. (N. Y.) 200; *People v. Cooper*, 58 How. Prac. (N. Y.) 358; *Simon v. City of Hoboken*, 52 N. J. Law, 367, 19 Atl. 259.

warranto.<sup>90</sup> This proceeding results, however, in amotion, and does not give induction.<sup>91</sup> In some states mandamus is used to try title.<sup>92</sup>

### SALARY

61. The salary prescribed by law for the official services of a municipal officer is considered the full compensation for all such services rendered by him during his term of office, even though his duties be increased by emergency or by law during the term.

The right of public officers to compensation is governed entirely by charter or statute. Unless the power to fix compensation is delegated to the municipal council, the whole matter is under the control of the Legislature, by which the compensation may be increased or diminished.<sup>93</sup> It is, however, generally recognized that the compensation of an officer cannot be increased or diminished during the term for which he

<sup>90</sup> Simon v. City of Hoboken, 52 N. J. Law (23 Vroom) 367, 19 Atl. 259; State ex rel. Mead v. Dunn, Minor (Ala.) 46, 12 Am. Dec. 25; Cockran v. McCleary, 22 Iowa, 75; Daniels v. Newbold, 125 Iowa, 193, 100 N. W. 1119; St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 355; State ex rel. Jones v. Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912; Board of Aldermen v. Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215; Bonner v. State ex rel. Pitts, 7 Ga. 473; Brown v. Turner, 70 N. C. 93; People ex rel. Brewster v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769. See, also, State ex rel. Johnston v. Badger, 90 Mo. App. 183; Searing v. Clark, 69 N. J. Law, 609, 55 Atl. 690; Mindermann v. Tillyer, 69 N. J. Law, 609, 55 Atl. 690.

<sup>91</sup> State v. Lane, 16 R. I. 620, 18 Atl. 1035; State ex rel. Kennedy v. Broatch, 68 Neb. 687, 94 N. W. 1017, 110 Am. St. Rep. 477.

<sup>92</sup> LAWRENCE v. INGERSOLL, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870, Cooley, Cas. Mun. Corp. 149; Luce v. Board of Examiners of Dukes County, 153 Mass. 108, 26 N. E. 419; Banton v. Wilson, 4 Tex. 400. See State ex rel. McCoale v. Kersten, 118 Wis. 287, 95 N. W. 120.

<sup>93</sup> Green v. Mayor, etc., of City of New York, 8 Abb. Prac. (N. Y.) 25; Id., 2 Hilt. (N. Y.) 203; People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Speed v. Common Council of City of Detroit, 100 Mich. 92, 58 N. W. 638; City of Wyandotte v. Drennan, 46 Mich. 478, 9 N. W. 500; Gooche v. Town of Exeter, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637; Love v. Mayor, etc., of City of Jersey City, 40 N. J. Law, 456; Waldraven v. Mayor, etc., of City of Memphis, 4 Cold. (Tenn.) 431; Gilbert v. Paducah, 115 Ky. 160, 72 S. W. 816, 24 Ky.

was elected or appointed.<sup>94</sup> The duties of the office may be made more or less onerous by legislation, or may be increased by emergency arising during the term.<sup>95</sup> The officer accepts the office in view of all these possible conditions, and impliedly undertakes to render whatever service may be required, either by law or by emergency during his official term, for such compensation as the Legislature has provided or may provide during the term.<sup>96</sup> The Legislature may or may not allow additional compensation for additional service imposed upon him. This he knows when he accepts the office, and he is bound to perform its duties for the salary affixed thereto.<sup>97</sup> He has no legal claim for additional

Law Rep. 1998; MARQUIS v. CITY OF SANTA ANA, 103 Cal. 661, 37 Pac. 650, Cooley, Cas. Mun. Corp. 158; Faulkner v. Sisson, 183 Mass. 524, 67 N. E. 669.

<sup>94</sup> MARQUIS v. CITY OF SANTA ANA, 103 Cal. 661, 37 Pac. 650, Cooley, Cas. Mun. Corp. 158; Barnes v. Williams, 53 Ark. 205, 13 S. W. 845; Purdy v. City of Independence, 75 Iowa, 356, 39 N. W. 641; Commonwealth v. Bacon, 6 Serg. & R. (Pa.) 322; Meissner v. Boyle, 20 Utah, 316, 58 Pac. 1110; Bowe v. City of St. Paul, 70 Minn. 341, 73 N. W. 184.

<sup>95</sup> Mayor, etc., of City of Baltimore v. Ritchie, 51 Md. 233; Leveridge v. City of New York, 5 N. Y. Super. Ct. 263; Goud v. City of Portland, 96 Me. 125, 51 Atl. 820; State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L. R. A. (N. S.) 1127; Commissioners v. Murray, 3 Watts (Pa.) 348; City of Covington v. Mayberry, 9 Bush (Ky.) 304; Board of Education v. Quick, 99 N. Y. 138, 1 N. E. 533.

<sup>96</sup> Gilmore v. Lewis, 12 Ohio, 281; Buck v. City of Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409; Evans v. Inhabitants of City of Trenton, 24 N. J. Law, 766; City of Detroit v. Redfield, 19 Mich. 376; Waterman v. The Mayor, 7 Daly (N. Y.) 489. It was held in Albright v. Bedford County, 106 Pa. 582, that where an officer's compensation is fixed by statute he cannot recover extra compensation for expenses incurred in performing his duties, even though the custom has been for a long time that the corporation should bear them. But see City of Ludlow v. Richie, 25 Ky. Law Rep. 1581, 78 S. W. 199.

<sup>97</sup> Sidway v. South Park Com'rs, 120 Ill. 496, 11 N. E. 852; Buck v. City of Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409; Ryce v. City of Osage, 88 Iowa, 558, 55 N. W. 532; City of Covington v. Mayberry, 9 Bush (Ky.) 304; White v. Polk County, 17 Iowa, 413; City of Ludlow v. Richie, supra. A salaried officer of a public corporation made claim for extra compensation on the ground that his official duties had been increased, new duties being added since the sal-

compensation for additional service though the salary be confessedly inadequate.<sup>98</sup> Nor is it competent for the board to vote an increase of compensation for extra services;<sup>99</sup> and it has been held that an alderman is indictable for misdemeanor who votes an increase of salary to himself when the statute forbids him to vote on any subject in which he is interested, even though he does not take the salary.<sup>1</sup> With regard to the salaries of de facto officers in municipal corporations, suffice it to say that the salary belongs to the officer de jure, and an action cannot be maintained for it by the officer

ary was fixed. It was held that he was not entitled to an increase. *People v. Supervisors of City and County of New York*, 1 Hill (N. Y.) 362. But in special instances, as where the law has required an officer to perform services attended with trouble and expense, and clearly outside of his regular official duties, he may recover. *People v. Supervisors of Albany County*, 12 Wend. (N. Y.) 257. See, also, *Huffman v. Board of Com'rs of Greenwood County*, 23 Kan. 281 (as to services rendered by city and county attorneys, not required as part of their duties); *Goud v. City of Portland*, 96 Me. 125, 51 Atl. 820; *Finley v. Territory ex rel. Keyes*, 12 Okl. 621, 73 Pac. 273.

<sup>98</sup> *City of Poughkeepsie v. Wiltsie*, 36 Hun (N. Y.) 270; *City of Council Bluffs v. Waterman*, 86 Iowa, 688, 53 N. W. 289; *Coleman v. City of Elgin*, 45 Ill. App. 64; *City of Covington v. Mayberry*, 9 Bush (Ky.) 304; *Bartch v. Cutler*, 6 Utah, 409, 24 Pac. 526; *Gordon County Com'rs v. Harris*, 81 Ga. 719, 8 S. E. 427; *Stiffler v. Board of Com'rs of Delaware County*, 1 Ind. App. 368, 27 N. E. 641; *Beard v. City of Decatur*, 64 Tex. 7, 53 Am. Rep. 735; *Stockwell v. Genesee Sup'r's*, 56 Mich. 221, 23 N. W. 25; *In re Parsons*, 54 N. Y. Super. Ct. 451.

<sup>99</sup> *Garvie v. City of Hartford*, 54 Conn. 440, 7 Atl. 723; *Buck v. City of Eureka*, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409; *Debolt v. Trustees of Cincinnati Tp.*, 7 Ohio St. 237; *Preston v. Bacon*, 4 Conn. 471; *Heslep v. City of Sacramento*, 2 Cal. 580 (vote of \$10,000 to mayor, for meritorious services, held void); *Reif v. Paige*, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; *State ex rel. Kercheval v. Mayor, etc., of City of Nashville*, 15 Lea (Tenn.) 697, 54 Am. Rep. 427. In *Cloonan v. City of Kingston*, 37 Misc. Rep. 322, 75 N. Y. Supp. 425, it was held that where the common council has power to fix the salary of the city attorney it may award him compensation for preparing a revision of the city charter, in excess of the amount of his salary. See *Board of Education of Lexington v. Moore*, 114 Ky. 640, 71 S. W. 621, 24 Ky. Law Rep. 1478.

<sup>1</sup> *State v. Van Auken*, 98 Iowa, 674, 68 N. W. 454; *Duty v. State*, 9 Ind. App. 595, 36 N. E. 655; *State v. Shea*, 106 Iowa, 735, 72 N. W. 300; *People v. Bogart*, 3 Parker, Cr. R. (N. Y.) 143.

de facto.<sup>2</sup> The officer de jure may sue the corporation for his salary if it has not been paid to the officer de facto, even though the latter rendered the services.<sup>3</sup> The officer de jure may also recover from the officer de facto the amount of salary paid to him;<sup>4</sup> but he cannot enjoin such payment except upon recognized grounds of equity, such as insolvency.<sup>5</sup> Whether the officer de jure may recover from the municipality the salary already paid to the officer de facto is diversely ruled by the courts, some holding that he can,<sup>6</sup> others that he cannot.<sup>7</sup>

<sup>2</sup> Jones v. Easton, 4 Pa. Dist. R. 509; Dolan v. Mayor, etc., of City of New York, 68 N. Y. 274, 23 Am. Rep. 168; McCue v. County of Wapello, 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134; Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Whitaker v. City of Topeka, 9 Kan. App. 213, 59 Pac. 668; City of Jersey City v. Erwin, 59 N. J. Law, 282, 35 Atl. 948.

<sup>3</sup> Dolan v. Mayor, etc., of City of New York, 68 N. Y. 274, 23 Am. Rep. 168; State ex rel. Cronin v. Eshelby, 2 Ohio Cir. Ct. R. 468; Meehan v. Board of Chosen Freeholders of Hudson County, 46 N. J. Law, 276, 50 Am. Rep. 421; Burke v. Edgar, 67 Cal. 182, 7 Pac. 488; Meagher v. Storey County, 5 Nev. 244.

<sup>4</sup> Westberg v. City of Kansas, 64 Mo. 493; Michel v. City of New Orleans, 32 La. Ann. 1094; Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Bier v. Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299; Nichols v. MacLean, 101 N. Y. 526, 5 N. E. 347, 64 Am. Rep. 730; People ex rel. Benoit v. Miller, 24 Mich. 458, 9 Am. Rep. 131.

<sup>5</sup> Bruner v. Bryan, 50 Ala. 523; Field v. Commonwealth, 32 Pa. 478; Page v. Hardin, 8 B. Mon. (Ky.) 648; Dolan v. Mayor, etc., of City of New York, 68 N. Y. 274, 23 Am. Rep. 168; Bowerbank v. Morris (C. C.) Wall. Sr. 118, Fed. Cas. No. 1,726.

<sup>6</sup> State ex rel. Cullen v. Carr, 3 Mo. App. 6; People v. Brennan, 30 How. Prac. (N. Y.) 417; Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; State ex rel. Worrell v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743; Mayor, etc., of City of Memphis v. Woodward, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Kendall v. Raybould, 13 Utah, 226, 44 Pac. 1034; State ex rel. Greeley County v. Milne, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 38 Am. St. Rep. 724.

<sup>7</sup> Westberg v. City of Kansas, 64 Mo. 493; Saline County Com'r's v. Anderson, 20 Kan. 298, 27 Am. Rep. 171; State v. Milne, *supra*.

## RESIGNATION

- ✓ 62. At common law both tender and acceptance were essential to effect the resignation of municipal officers; but this rule, though recognized still in some localities, is not generally regarded as the law in America.

The common-law doctrine was that, since public servants were necessary to execute the laws, an office was a burden to be borne by the citizen in the interest of the community,<sup>8</sup> and therefore when chosen to it he must accept it, and could not resign it without consent of the appointing power.<sup>9</sup> This doctrine is still recognized in Virginia,<sup>10</sup> North Carolina,<sup>11</sup> Tennessee,<sup>12</sup> Kansas,<sup>13</sup> and perhaps some other states; but the contrary has been expressly ruled in Iowa, Ohio,<sup>14</sup> Nebraska,<sup>15</sup> California,<sup>16</sup> and other states, and is more consonant with American habits of thought. However, it has been held by the federal courts<sup>17</sup> and the courts of Texas<sup>18</sup> and Ill-

Steubenville v. Culp, 38 Ohio St. 18, 43 Am. Rep. 417; Couglan v. McElroy, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224; Demarest v. City of New York, 147 N. Y. 203, 41 N. E. 405; State ex rel. Vail v. Clark, 52 Mo. 508; Scott v. Crump, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478; McDonald v. City of Newark, 58 N. J. Law, 12, 32 Atl. 384; State ex rel. Cronin v. Eshelby, 2 Ohio Cir. Ct. R. 468.

<sup>8</sup> Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; Edwards v. United States ex rel. Thompson, 103 U. S. 471, 26 L. Ed. 314; Willc., Mun. Corp. p. 129.

<sup>9</sup> 1 Dill. Mun. Corp. § 224.

<sup>10</sup> Coleman v. Sands, 87 Va. 689, 13 S. E. 148.

<sup>11</sup> Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677.

<sup>12</sup> Kain, Tennessee Officer, § 2.

<sup>13</sup> State ex rel. Toepke v. Clayton, 27 Kan. 442, 41 Am. Rep. 418.

<sup>14</sup> Reiter v. State, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681.

<sup>15</sup> State ex rel. Roberts v. Mayor, etc., of City of Lincoln, 4 Neb. 260.

<sup>16</sup> People v. Porter, 6 Cal. 26; Primm v. City of Carondelet, 23 Mo. 22.

<sup>17</sup> Badger v. United States ex rel. Bolles, 93 U. S. 599, 23 L. Ed. 991; United States v. Green (C. C.) 53 Fed. 769.

<sup>18</sup> Jones v. City of Jefferson, 66 Tex. 576, 1 S. W. 903; Keen v.

inois<sup>19</sup> that, when the law provides that an incumbent shall hold office until his successor is elected and qualified, he is not relieved from the duties of his office even by the acceptance of his resignation, but must await the qualification of his successor. Written or record evidence is essential to an express resignation; but the acceptance may be manifested by a formal declaration or by the appointment of a successor.<sup>20</sup> Though a resignation that has not yet been accepted may be withdrawn,<sup>21</sup> an attempted withdrawal of an absolute resignation will not restore the right to the office.<sup>22</sup>

#### *Implied*

Resignation of office may be implied as well as express. When residence is a qualification for a municipal office, an officer vacates his office by removing beyond the corporate limits.<sup>23</sup> So, likewise, when he accepts and assumes an incompatible office.<sup>24</sup> In both instances the original office instantly terminates without judicial proceedings, and the successor may be forthwith elected or appointed to fill the va-

Featherston, 29 Tex. Civ. App. 563, 69 S. W. 983; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109.

<sup>19</sup> *People ex rel. Illinois Midland Ry. Co. v. Supervisor of Barnett Tp.*, 100 Ill. 332. See, also, *Fryer v. Norton*, 67 N. J. Law, 537, 52 Atl. 476; *Attorney General v. Marston*, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; note to *Reiter v. State*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681.

<sup>20</sup> *People v. Hanifan*, 6 Ill. App. 158; *Id.*, 96 Ill. 420; *Bath v. Reed*, 78 Me. 276, 4 Atl. 688; *Edwards v. United States ex rel. Thompson*, 103 U. S. 471, 26 L. Ed. 314; *Reiter v. State*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681.

<sup>21</sup> *People v. Board of Police for Metropolitan Police Dist.*, 26 Barb. (N. Y.) 487; *Biddle v. Willard*, 10 Ind. 62.

<sup>22</sup> *Bunting v. Willis*, 27 Grat. (Va.) 144, 21 Am. Rep. 338; *State ex rel. Bergshicher v. Grace*, 113 Tenn. 9, 82 S. W. 485.

<sup>23</sup> *People v. Hull*, 64 Hun, 638, 19 N. Y. Supp. 536; *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551; *Curry v. Stewart*, 8 Bush (Ky.) 560; *People ex rel. Tennant v. Parker*, 3 Neb. 409, 19 Am. Rep. 634; *Commonwealth v. Lally*, 30 Leg. Int. (Pa.) 296.

<sup>24</sup> *People v. Murray*, 73 N. Y. 535; *O'Brien v. City of New York*, 84 Hun, 50, 32 N. Y. Supp. 34; *People v. Carrique*, 2 Hill (N. Y.) 93; *Mechem, Pub. Off.* § 421; 1 Dill. Mun. Corp. § 225.

cancy thus created.<sup>25</sup> But a bonded officer cannot discharge his obligation by resignation in either of the foregoing methods.<sup>26</sup> And an exception to the general rule is made in those jurisdictions where acceptance is held necessary to complete the resignation.<sup>27</sup> Whether the new office is incompatible with the former one is a question to be decided by the courts; there must be either a statutory inhibition or an obvious inconsistency in the functions of the two offices.<sup>28</sup> Official notice of this implied resignation can be taken only by that government under which the first office is held; for example, when a congressman accepts the office and performs the duties of a state judge, he is a *de facto* judge, though he continues also to hold his seat in Congress.<sup>29</sup>

<sup>25</sup> *Wilson v. King*, 3 Litt. (Ky.) 457, 14 Am. Dec. 84; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Edwards v. United States ex rel. Thompson*, 103 U. S. 471, 26 L. Ed. 314; *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *People v. Hanifan*, 6 Ill. App. 158.

<sup>26</sup> *Attorney General v. Marston*, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; *City of Philadelphia v. Marcer*, 1 Leg. Gaz. R. (Pa.) 355.

<sup>27</sup> *Mechem, Pub. Off.* § 421.

<sup>28</sup> *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Preston v. United States* (D. C.) 37 Fed. 417; *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *People v. Green*, 5 Daly (N. Y.) 254; *Id.*, 58 N. Y. 295; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251.

The office of mayor is held to be incompatible with town clerk, 7 Com. Dig. tit. "Officer," B 6; retired army officer, *State v. De Gress*, 53 Tex. 387; prison commissioner, *Howard v. Shoemaker*, 35 Ind. 111. The office of alderman is held incompatible under English law with that of county treasurer, town clerk, burgess, and city chamberlain. *Throop, Pub. Off.* § 35.

<sup>29</sup> *Calloway v. Sturm*, 1 Heisk. (Tenn.) 764; *Mayor, etc., of City of Nashville v. Thompson*, 12 Lea (Tenn.) 348.

## REMOVAL

63. Generally, the power of removal is an incident of the power of appointment; and, where an officer holds during the will and pleasure of the appointing power, that power is also the removing power, and is sole judge of the propriety of removal.

The Legislature may authorize the removal of appointive officers at the will of the appointing power,<sup>30</sup> but an elective officer can be removed from office only by due process of law.<sup>31</sup> The power of removal includes the power of suspension pending trial.<sup>32</sup> This power may be conferred either up-

<sup>30</sup>Armatage v. Fisher, 74 Hun, 167, 26 N. Y. Supp. 364; People v. Mayor, etc., of City of New York, 16 Hun (N. Y.) 309; State ex rel. Dickson v. Williams, 6 S. D. 119, 60 N. W. 410; Christy v. Kingfisher, 13 Okl. 585, 76 Pac. 135; People v. Whitlock, 92 N. Y. 191; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

In the absence of express grant or implied limitation of authority, a municipal corporation possesses the incidental power to remove for cause the corporate officers, whether elected by it or by the people. State ex rel. McMahon v. City of New Orleans, 107 La. 632, 32 South. 22; City of Savannah v. Grayson, 104 Ga. 105, 30 S. E. 693; Muhler v. Hedekin, 119 Ind. 481, 20 N. E. 700. But see Speed v. Common Council of City of Detroit, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555; Caulfield v. State ex rel. Attorney General, 1 S. C. 461; People v. McAllister, 10 Utah, 357, 37 Pac. 578; State ex rel. v. Kiichli, 53 Minn. 147, 54 N. W. 1069, 19 L. R. A. 779; State ex rel. v. Shearman, 51 Kan. 686, 35 Pac. 455; State ex rel. Williams v. Kennelly, 75 Conn. 704, 55 Atl. 555.

<sup>31</sup> State ex rel. Attorney General v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 181; State ex rel. Brandt v. Thompson, 91 Minn. 279, 97 N. W. 887; People v. Commissioners' Dept. Fire and Buildings, 106 N. Y. 64, 12 N. E. 641; Trainor v. Board, *supra*; Board of Aldermen v. Darrow, 13 Colo. 460, 22 Pac. 784, 16 Am. St. Rep. 215; Field v. Commonwealth, 32 Pa. 478.

<sup>32</sup> State ex rel. Campbell v. Police Commissioners, 16 Mo. App. 48; State ex rel. v. Peterson, 50 Minn. 239, 52 N. W. 655; Blackwell v. Thayer, 101 Mo. App. 661, 74 S. W. 375; Shannon v. City of Portsmouth, 54 N. H. 183. But such suspension cannot be indefinitely without pay. Gregory v. Mayor, etc., of New York, 113 N. Y. 416, 21

on the mayor or the Governor of the state;<sup>33</sup> but in case of conviction of crime which disqualifies from holding office, the court may pronounce the sentence of disqualification and removal.<sup>34</sup> Generally the power of removal can be exercised only for cause;<sup>35</sup> but, in the absence of any such restriction, removal may be made at the discretion of the appointing power.<sup>36</sup> When the power of removal is not discretionary, but only for cause, it is usually necessary that there should be due notice and a hearing of the charges.<sup>37</sup> The proceedings are judicial in their nature and may be reviewed on certiorari.<sup>38</sup>

N. E. 119, 3 L. R. A. 854. *Contra, Tyrrell v. Common Council of Jersey City*, 25 N. J. Law, 536.

<sup>33</sup> *State ex rel. Attorney General v. Johnson*, 30 Fla. 433, 11 South. 845, 18 L. R. A. 414; *Carr v. State*, 111 Ind. 101, 12 N. E. 107; *State ex rel. Williams v. Kennelly*, 75 Conn. 704, 55 Atl. 555; *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429; *Commonwealth v. Crogan*, 155 Pa. 448, 26 Atl. 697; *Wilcox v. People ex rel. Lipe*, 90 Ill. 186.

<sup>34</sup> *State ex rel. Clements v. Humphries*, 74 Tex. 466, 12 S. W. 99, 5 L. R. A. 217; *Mayor, etc., of City of Macon v. Shaw*, 16 Ga. 172; *People v. Board of Police of City of New York*, 9 Hun (N. Y.) 222; *Commonwealth v. Jones*, 10 Bush (Ky.) 725. *Contra, People v. Board of Police Com'rs*, 11 Hun (N. Y.) 403; *Oliver v. City Council of Americus*, 69 Ga. 165.

<sup>35</sup> *STATE ex rel. v. COMMON COUNCIL OF CITY OF DULUTH*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595, Cooley, Cas. Mun. Corp. 161; *Field v. Malster*, 88 Md. 691, 41 Atl. 1087; *State v. Donovan*, 89 Me. 448, 36 Atl. 982; *Milliken v. City Council of City of Weatherford*, 54 Tex. 388, 38 Am. Rep. 629; *People v. McAllister*, 10 Utah, 357, 37 Pac. 578; *Mayor, etc., of City of Indianapolis v. Geisel*, 19 Ind. 344.

<sup>36</sup> *London v. City of Franklin*, 118 Ky. 105, 80 S. W. 514; *Magner v. City of St. Louis*, 179 Mo. 495, 78 S. W. 782. See, also, *State ex rel. Williams v. Kennelly*, 75 Conn. 704, 55 Atl. 555.

<sup>37</sup> *STATE ex rel. v. COMMON COUNCIL OF CITY OF DULUTH*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595, Cooley, Cas. Mun. Corp. 161; *Haight v. Love*, 39 N. J. Law, 14; *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429.

<sup>38</sup> *STATE ex rel. HART v. COMMON COUNCIL OF CITY OF DULUTH*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595, Cooley, Cas. Mun. Corp. 161; *People v. Nichols*, 79 N. Y. 582; *People ex rel. Freeman v. McGuire*, 27 App. Div. 593, 50 N. Y. Supp. 520. See, also, *State ex rel. Starkweather v. Common Council of City of Superior*, 90 Wis. 612, 64 N. W. 304.

### JUDICIAL CONTROL

64. Municipal officers are subject to judicial control by mandamus, injunction, or amotion to compel performance of judicial duties, observance of the law, and removal of unworthy officers.

The jurisdiction of courts in supervising official action is generally limited to ministerial duties.<sup>39</sup> Courts will not substitute their judgment for that of public officers in whom discretion is vested;<sup>40</sup> but this rule is limited by the restriction that "the discretion must be exercised within its proper limits for the purposes for which it is given, and from the motives by which alone those who gave the discretion intended that its exercise should be governed."<sup>41</sup> And so, where power is given to a board of supervisors to fix water rates, the rate fixed must be reasonable and just, so as not to amount to a practical confiscation of the property of the water company, otherwise the courts will interfere.<sup>42</sup> Likewise, where the board of aldermen is made the sole judge of the qualification, election, and return of its own members, it must observe the limits of its jurisdiction and exercise its power regularly, or the courts will supervise the same by certiorari.<sup>43</sup> If, how-

<sup>39</sup> Ray v. Wilson, 29 Fla. 342, 10 South. 613, 14 L. R. A. 773; Commonwealth ex rel. Vandyke v. Henry, 49 Pa. 530; Hudmon v. Slaughterer, 70 Ala. 546; People ex rel. Traders' Ins. Co. of New York v. Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; City of Madison v. Smith, 83 Ind. 502.

<sup>40</sup> 1 Dill. Mun. Corp. §§ 94, 95, 835-837; State ex rel. Union Fuel Co. v. City of Lincoln, 68 Neb. 597, 94 N. W. 719; In re Molineux, 41 Misc. Rep. 154, 83 N. Y. Supp. 943.

<sup>41</sup> People v. Sturtevant, 9 N. Y. (5 Seld.) 263, 59 Am. Dec. 536; Davis v. Mayor of City of New York, 1 Duer (N. Y.) 451.

<sup>42</sup> Spring Valley Water-Works v. City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

<sup>43</sup> STATE ex rel. v. COMMON COUNCIL OF CITY OF DULUTH, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595, Cooley, Cas. Mun. Corp. 161; Echols v. State ex rel. Dunbar, 56 Ala. 131; State ex rel. Turner v. Fitzgerald, 44 Mo. 425; Commonwealth v. Allen, 70 Pa. 465;

ever, any officer refuses to perform a mandatory duty, its performance will be enforced by mandamus,<sup>44</sup> for contempt of which the officer may be punished.<sup>45</sup> Nor can he escape this penalty by resignation after service of the process.<sup>46</sup> So, also, officers may be enjoined from illegal acts threatened under color of their official position.<sup>47</sup> Here, too, the courts will carefully inquire whether the threatened act of the officer is beyond his proper discretion. If not, the injunction will be refused.<sup>48</sup>

*State v. Gates*, 35 Minn. 385, 28 N. W. 927. But see *Keating v. Stack*, 116 Ill. 191, 5 N. E. 541.

<sup>44</sup> *United States ex rel. Brown v. Memphis*, 97 U. S. 284, 24 L. Ed. 937; *United States v. Lawrence*, 3 Dall. (U. S.) 42, 1 L. Ed. 502; *Kennedy v. Washington*, 3 Cranch, C. C. 595, Fed. Cas. No. 7,708; *Coy v. City Council of Lyons City*, 17 Iowa, 1, 85 Am. Dec. 539; *Memphis v. Brown*, 97 U. S. 300, 24 L. Ed. 924; *Mayor, etc., of City of New Orleans v. Morgan*, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232; *Bramder v. Chesterfield Justices*, 5 Call. (Va.) 548, 2 Am. Dec. 606.

<sup>45</sup> *State ex rel. Bauman v. Judge of Civil District Court*, 38 La. Ann. 43, 58 Am. Rep. 158.

<sup>46</sup> *Edwards v. United States ex rel. Thompson*, 103 U. S. 471, 26 L. Ed. 314; *Jones v. City of Jefferson*, 66 Tex. 576, 1 S. W. 903.

<sup>47</sup> *Payne v. English*, 79 Cal. 540, 21 Pac. 952; *Buchanan v. Beaver Borough*, 171 Pa. 567, 33 Atl. 115; *Holden v. City of Alton*, 179 Ill. 318, 53 N. E. 556; *Morton v. Carlin*, 51 Neb. 202, 70 N. W. 966; *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091; *Northern Pac. R. Co. v. City of Spokane (C. C.)* 52 Fed. 428; *Ambrose v. Buffalo (Super. N. Y.)* 20 N. Y. Supp. 129; *Quinton v. Burton*, 61 Iowa, 471, 16 N. W. 569; *Dudley v. Trustees of Frankfort*, 12 B. Mon. (Ky.) 610; *City of Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265.

Mandamus will lie to compel the performance of purely ministerial duties incumbent on an officer by virtue of his office, and concerning which he possesses no discretionary powers. *Warmolts v. Keegan*, 69 N. J. Law, 186, 54 Atl. 813. See *State ex rel. Clement v. Stokes*, 99 Mo. App. 236, 73 S. W. 254; *People ex rel. De Groat v. Marlett*, 41 Misc. Rep. 151, 83 N. Y. Supp. 962; *Finley v. Territory ex rel. Keys*, 12 Okl. 621, 73 Pac. 273.

<sup>48</sup> *Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353; *Knapp, Stout & Co. Company v. City of St. Louis*, 153 Mo. 560, 55 S. W. 104; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219; *Fellows v. Walker (C. C.)* 39 Fed. 651; *Lane v. Schomp*, 20 N. J. Eq. 82.

**PERSONAL LIABILITY—CONTRACTS**

65. Without special personal undertaking, officers are not personally liable upon contracts made by them for and on behalf of the corporation.

When contracts are formally made in the name of the corporation questions of personal liability can rarely arise, but upon parol contracts and informal written ones much litigation has arisen over the personal liability of the officers contracting. The courts have usually decided these cases upon the manifest intention of the contracting parties;<sup>49</sup> for example, it has been held that a note promising payment by the signers "as trustees of school district" did not bind the individual signers, but the school district.<sup>50</sup> So, for gravel sold on the credit of a town upon the order of a surveyor of highways, with authority to purchase, the town and not the surveyor is liable.<sup>51</sup> And generally, wherever the promise of a public officer is connected with a subject fairly within the scope of his authority, it will be presumed to have been made in his public character, unless the intention to bind himself personally is evident.<sup>52</sup> The invalidity of the promise as a municipal contract will not make the officer personally liable without evidence of his intention to become so.<sup>53</sup> But it has been held that an overseer of the poor makes himself personally liable by promising that he will be responsible for the payment of the charges.<sup>54</sup> In fine, the rule is well settled that wherever the parties understand that the contract is made

<sup>49</sup> Willett v. Young, 82 Iowa, 292, 47 N. W. 990, 11 L. R. A. 115.

<sup>50</sup> Sanborn v. Neal, 4 Minn. 126 (Gil. 83), 77 Am. Dec. 502.

<sup>51</sup> Brown v. Rundlett, 15 N. H. 360.

<sup>52</sup> Parks v. Ross, 11 How. (U. S.) 362, 13 L. Ed. 730.

<sup>53</sup> Houston v. Board of Com'rs of Clay County, 18 Ind. 396; Boardman v. Hayne, 29 Iowa, 339; LAWRENCE v. TOOTHAKER, 75 N. H. 148, 71 Atl. 534, 23 L. R. A. (N. S.) 428, Cooley, Cas. Mun. Corp. 164; McCracken v. Lavalle, 41 Ill. App. 573.

<sup>54</sup> King v. Butler, 15 Johns. (N. Y.) 281; Ives v. Hulet, 12 Vt. 314.

by the officer on behalf of the corporation, and it is within the scope of his authority, the corporation alone is liable, and the officer becomes personally liable only upon manifest intention to that effect.<sup>55</sup>

#### SAME—TORTS

66. If the duty imposed upon an officer is a duty to the public, a failure to perform it or an inadequate or erroneous performance is a public injury, and must be redressed, if at all, in some form of public prosecution. But if, on the contrary, the duty is a duty to an individual, then the neglect to perform it properly is an individual wrong, and may support an individual action for damages.

It is a general rule that judicial officers acting within their jurisdiction and officers charged with discretionary powers cannot be held personally liable for the improper or erroneous performance of their duties.<sup>56</sup> This rule embraces all officers exercising discretionary powers, and consequently protects members of an equalizing board,<sup>57</sup> inspectors of fruits and meats,<sup>58</sup> board of street commissioners,<sup>59</sup> tax assessors,<sup>60</sup> au-

<sup>55</sup> *Blanchard v. Inhabitants of Blackstone*, 102 Mass. 343; *Hodges v. Runyan*, 30 Mo. 491; *Balcombe v. Northup*, 9 Minn. 173 (Gil. 159); *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83; *Southworth v. Flanders*, 33 La. Ann. 190; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Gale v. Village of Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

<sup>56</sup> *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Mostyn v. Fabrigas*, 1 Smith's Lead. Cas. (8th Ed.) 1027; *People ex rel. Burns v. Bender*, 36 Mich. 195; *Wamesit Power Co. v. Allen*, 120 Mass. 352.

<sup>57</sup> *Steele v. Dunham*, 26 Wis. 393.

<sup>58</sup> *Fath v. Koeppe*, 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867.

<sup>59</sup> *Robinson v. Rohr*, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366, 9 Am. St. Rep. 810; *Atwater v. Trustees of Village of Canandaigua*, 124 N. Y. 602, 27 N. E. 385.

<sup>60</sup> *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Cooley, Tax'n*, 551 et seq.

ditors of claims,<sup>61</sup> officers employed to lay out, alter, and discontinue highways,<sup>62</sup> mayors,<sup>63</sup> constables, and justices of the peace,<sup>64</sup> and, generally, all boards invested with discretionary power.<sup>65</sup> But it is generally held that this exemption from liability in the performance of discretionary public functions does not exist when the officer has been actuated by corrupt or malicious motives,<sup>66</sup> or has practiced fraud upon the person suffering injury.<sup>67</sup> On the other hand, the general rule is that in the performance of merely ministerial duties an officer is liable to third persons for injury suffered by his nonfeasance or misfeasance,<sup>68</sup> and this rule applies not only to

<sup>61</sup> *Wall v. Trumbull*, 16 Mich. 228.

<sup>62</sup> *Sage v. Laurain*, 19 Mich. 137; *Tate v. City of Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; *Scovil v. Geddings*, 7 Ohio, 211, pt. 2; *Squiers v. Village of Neenah*, 24 Wis. 588.

<sup>63</sup> *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Pruden v. Love*, 67 Ga. 190.

<sup>64</sup> *Cooley, Torts*, § 419; *Bish. Noncont. Law*, § 783; *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Harvey v. Dewoody*, 18 Ark. 252. *Contra*, *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Houlden v. Smith*, 14 Adol. & E. (N. S.) 841.

<sup>65</sup> *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463; *Mostyn v. Fabrigas*, 1 Smith's Lead. Cas. (8th Ed.) 1027; *Craig v. Burnett*, 32 Ala. 728; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256.

<sup>66</sup> *BOUTTE v. EMMER*, 43 La. Ann. 980, 9 South. 921, 15 L. R. A. 63, *Cooley, Cas. Mun. Corp.* 166; *Pruden v. Love*, 67 Ga. 190; *McCarthy v. De Armit*, 99 Pa. 63; *Rounds v. Mumford*, 2 R. I. 154; *Baker v. State*, 27 Ind. 485; *McTeer v. Lebow*, 85 Tenn. 121, 2 S. W. 18; *Wilkes v. Dinsman*, 7 How. (U. S.) 89, 12 L. Ed. 618; *Hoggatt v. Bigley*, 6 Humph. (Tenn.) 236; *Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343. Public officers may also be liable in a criminal action for negligence in the performance of their duty, and this is particularly so with police officers. *People v. Diamond*, 72 App. Div. 281, 76 N. Y. Supp. 57; *People v. Foody*, 39 Misc. Rep. 142, 79 N. Y. Supp. 240.

<sup>67</sup> *City of Oakland v. Carpentier*, 13 Cal. 540; *Roper v. McWhorter*, 77 Va. 214.

<sup>68</sup> *Amy v. Supervisors*, 11 Wall. (U. S.) 136, 20 L. Ed. 101; *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Hover v. Barkhoof*, 44 N. Y. 113; *Allen v. Commonwealth*, 83 Va. 94, 1 S. E. 607; *Blair*

purely ministerial officers, but also to those whose duties are partly discretionary and partly ministerial.<sup>69</sup>

#### *Illustrations*

For example, a board of street commissioners, in determining upon the work to be done on adopting plans and specifications therefor, act in a quasi-judicial capacity, and no private action will lie against them for damage done in exercising these functions. But if they undertake to execute these plans and specifications, either personally or with the aid of employés, they are liable to third persons for injury suffered from such acts, which are done in a ministerial capacity.<sup>70</sup> It has accordingly been held that a mayor, marshal, and board of health were liable for negligence in removing from the city a smallpox patient and carelessly exposing him to inclement weather so as to cause his death.<sup>71</sup> So also is a public meat inspector for failing to discharge his duty;<sup>72</sup> and street officers for injury done to an adjoining property by changing the grade of the street.<sup>73</sup> A ministerial act has been judicially defined to be "one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done."<sup>74</sup> For the nonfeasance or misfeasance of such official acts the officer is held liable in law;<sup>75</sup> but if he dis-

v. Lantry, 21 Neb. 247, 31 N. W. 790; Piercy v. Averill, 37 Hun (N. Y.) 360.

<sup>69</sup> Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366, 9 Am. St. Rep. 810; Rounds v. Mumford, 2 R. I. 154.

<sup>70</sup> Robinson v. Rohr, *supra*. See Bowden v. Derby, 97 Me. 536, 55 Atl. 417, 63 L. R. A. 223, 94 Am. St. Rep. 516; Buskirk v. Strickland, 47 Mich. 389, 11 N. W. 210.

<sup>71</sup> Aaron v. Broiles, 64 Tex. 316, 53 Am. Rep. 764.

<sup>72</sup> Hayes v. Porter, 22 Me. 371.

<sup>73</sup> Rives v. City of Columbia, 80 Mo. App. 173; Rounds v. Mumford, 2 R. I. 154.

<sup>74</sup> Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468. But see Interstate Transp. Co. v. City of New Orleans, 52 La. Ann. 1859, 28 South. 310.

<sup>75</sup> Woolley v. Baldwin, 101 N. Y. 688, 5 N. E. 573; Conway v. Rus-

charge such duties faithfully he is not liable, though injury may result therefrom.

*Exemption from Liability*

It is also held that an officer is not liable to a private action for neglect of an exclusively public duty, even to a person specially injured thereby, and in some cases even though the act was unlawful and malicious.<sup>76</sup> This results from the exemption of the sovereign from suit, and the consequent exemption of the public officer performing the functions of the sovereign. Damage alone does not constitute a wrong; the party injured by an officer must show that he suffers from the neglect of some private duty which the officer owed to him.<sup>77</sup>

**SAME—REIMBURSEMENT OF MUNICIPALITY  
FOR LOSS**

67. An officer is liable to remunerate the municipality in any sum which it has lost or been compelled to pay in consequence of his official nonfeasance, misfeasance, or malfeasance of ministerial duty.

Obviously a fiscal officer who converts or loses municipal funds is personally liable to the corporation therefor. This liability is usually covered by an official bond; but whether the city have such bond or not there is a common-law liability on

sell, 151 Mass. 581, 24 N. E. 1026; Olmsted v. Dennis, 77 N. Y. 378; Eslava v. Jones, 83 Ala. 139, 3 South. 317, 3 Am. St. Rep. 699; Griener v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Raynsford v. Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; Sawyer v. Corse, 17 Grat. (Va.) 230, 94 Am. Dec. 445; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Collins v. McDaniel, 66 Ga. 203; St. Joseph Fire & Marine Ins. Co. v. Leland, 90 Mo. 177, 2 S. W. 431, 59 Am. Rep. 9; Stevens v. Dudley, 56 Vt. 158.

<sup>76</sup> Cooley, *Torts*, p. 146; Moss v. Cummings, 44 Mich. 359, 6 N. W. 843.

<sup>77</sup> Sage v. Laurain, 19 Mich. 137; Inhabitants of Trescott v. Moan, 50 Me. 347; Billingsley v. State, 14 Md. 369; Held v. Bagwell, 58 Iowa, 139, 12 N. W. 226.

the part of the officer.<sup>78</sup> So, also, if in the exercise of his official functions, an officer so negligently, maliciously, or corruptly performs or fails to perform his duties as to render the corporation liable therefor to a third person, for which he recovers judgment against it, the officer, upon fundamental principles of law, is liable to an action by the municipality to reimburse it in the sum it has been thus compelled to pay for his official neglect of duty.<sup>79</sup>

### AGENTS

68. Municipal agents include all those officers, persons, and boards which are authorized by law to represent the corporation and bind it in its contracts and dealings with third persons.

A corporation can act only through human agency. Its complex organization sometimes requires very many agents to execute its multiform powers and discharge its various duties. The general managing agent of the corporation, as we have heretofore seen, is the governing body or common council,

<sup>78</sup> Inhabitants of Hancock v. Hazzard, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; Thompson v. Stickney, 6 Ala. 579; City of New Haven v. Fresenius, 75 Conn. 145, 52 Atl. 823; City of Lancaster v. Arnold (Ky.) 45 S. W. 82; People ex rel. Burns v. Bender, 36 Mich. 195; Bennett v. Whitney, 94 N. Y. 302; People v. Cooper, 10 Ill. App. 384. But see City of Livingston v. Woods, 20 Mont. 91, 49 Pac. 437.

Municipal authorities are not personally liable for money lawfully collected by them for one purpose, but applied to another lawful liability of the municipality, unless some charter provision or the general law imposes a liability on them in such instance, or unless their action puts it beyond the power of the municipality lawfully to raise, during the current year, the money with which to discharge the obligations for which the funds thus misapplied were originally intended. McCord v. City of Jackson, 135 Ga. 176, 69 S. E. 23.

<sup>79</sup> 1 Dill. Mun. Corp. §§ 236, 237; Rollins v. Board of Com'rs, 15 Colo. 103, 25 Pac. 319; City of Greenville v. Anderson, 58 Ohio St. 463, 51 N. E. 41; Porter v. Thomson, 22 Iowa, 391; Adams v. Lee, 72 Miss. 281, 16 South. 243.

resembling the directory of a private corporation;<sup>80</sup> but for the performance of the various municipal functions there are constituted a great variety of boards of commissioners, such as fire, street, water, police, dock, park, and the like. These are permanent positions, and are usually called and treated as offices, and governed by the law controlling them.<sup>81</sup> Besides these are often constituted temporary boards or personal agents for the accomplishment of some special work or the discharge of some temporary duty. Such boards and persons are usually and properly denominated municipal agents, as distinguished from officers.<sup>82</sup> The powers and duties of these agents are prescribed by law. This is the limit of their authority to represent and bind the corporation. All persons dealing with them as such corporation agents are bound to take notice of the scope of their agency.<sup>83</sup> Beyond this limit they may not go in corporate affairs. If they transgress these lawful boundaries they cannot bind the corporation, but may

<sup>80</sup> Ante, § 45; 1 Dill. Mun. Corp. c. 10; Elliott, Mun. Corp. §§ 253, 255.

<sup>81</sup> Elliott, Mun. Corp. §§ 252, 258; Boehm v. Mayor, etc., of City of Baltimore, 61 Md. 259; People v. McClave, 99 N. Y. 83, 1 N. E. 235; Mayor, etc., of City of Mobile v. Squires, 49 Ala. 339; Bonebrake v. Wall, 11 Ohio Dec. 38.

<sup>82</sup> Pinney v. Brown, 60 Conn. 164, 22 Atl. 430; New York, N. H. & H. R. Co. v. Wheeler, 72 Conn. 481, 45 Atl. 14; Barker v. Southern Const. Co., 47 S. W. 608, 20 Ky. Law Rep. 796; Reuting v. City of Titusville, 175 Pa. 512, 34 Atl. 916.

This employment of an agent to perform services for a municipality need not necessarily be by a formal ordinance, by-law, or resolution, nor is it essential that a contract be in writing. It may arise by implication, or from ratification of acts done by one assuming to act for the corporation. Wilt v. Redkey, 29 Ind. App. 199, 64 N. E. 228.

<sup>83</sup> Condran v. City of New Orleans, 43 La. Ann. 1202, 9 South. 31; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; State ex rel. City of St. Paul v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656. Cf. City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123; Kerr v. City of Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024; Mayor, etc., of Baltimore v. Musgrave, 48 Md. 272, 30 Am. Rep. 458; Parsel v. Barnes, 25 Ark. 261; Moore v. Mayor, etc., of City of New York, 73 N. Y. 238, 29 Am. Rep. 134.

thereby incur personal liability to third parties.<sup>84</sup> They are not, however, liable to the corporation for these ultra vires acts.<sup>85</sup>

### EMPLOYÉS

69. An employé of a municipal corporation, being engaged in the performance of a service purely ministerial, is not an officer nor an agent of the municipality, and cannot place it under obligation or liability.

The great mass of persons rendering service to a municipality are employés only, such as clerks, laborers, mechanics, firemen, and the like.<sup>86</sup> Their positions are permanent; the duties those of a subordinate. They constitute the rank and file of municipal forces, acting always in obedience to fixed rules or the orders of their superiors. They make no contracts for the municipality, and exercise no municipal discretion; and the only mode by which they may subject it to liability is that whereby private corporations may be rendered liable for the acts of their employés,<sup>87</sup> to wit, by some act done for the

<sup>84</sup> This will occur, however, only when such third persons are actually ignorant of the want of power, and the officers take unfair advantage of them, or practice fraud upon them. Otherwise they have been repeatedly adjudged not liable personally in ultra vires contracts made by them. *Barnes v. City of Philadelphia*, 3 Phila. (Pa.) 409; *Mayor, etc., of Baltimore v. Eschbach*, 18 Md. 276; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Tucker v. Justices of Iredell County*, 35 N. C. 434; *Lyon v. Irish*, 58 Mich. 518, 25 N. W. 502; *Houston v. Board of Com'rs of Clay County*, 18 Ind. 396; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Huthsing v. Bousquet (C. C.)* 2 McCrary, 152, 7 Fed. 833.

<sup>85</sup> *Houston v. Board of Com'rs of Clay County*, 18 Ind. 396; *Nickerson v. Dyer*, 105 Mass. 320; *Davis v. City of Philadelphia*, 3 Phila. (Pa.) 374.

<sup>86</sup> *Trainor v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; *McNulty v. City of New York*, 60 App. Div. 250, 70 N. Y. Supp. 133.

<sup>87</sup> *Clark, Priv. Corp.* § 69; *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N. E. 536; *Stephani v. City of Manitowoc*, 89 Wis. 467, 62 N. W. 176; *Hayes v. City of Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Knight*

municipality within the apparent scope of their employment which causes actionable injury to another, and then only in the performance of strictly municipal functions of the corporation. Employés are liable to the municipality under the same rules and restrictions as municipal officers, and are generally within civil service regulations.

v. City of Philadelphia, 15 Wkly. Notes Cas. (Pa.) 307; Hafford v. City of New Bedford, 16 Gray (Mass.) 297; Alexander v. City of Vicksburg, 68 Miss. 564, 10 South. 62; Kies v. City of Erie, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867.

## CHAPTER VIII

### CONTRACTS

- 70. In General.
- 71. Subject-Matter.
- 72. Contracting Agencies.
- 73. Mode of Contracting.
- 74. Letting of Contracts.
- 75. Validity in General.
- 76. Term and Duration of Contract—Power to Bind Successors.
- 77. Ultra Vires Contracts.
- 78. Same—Ratification and Estoppel.
- 79. Same—Contracts Partially Ultra Vires.
- 80. Implied Promise.
- 81. Illegal Contracts.
- 82. Annulling Contracts.
- 83. Impairing Obligations.
- 84. Money Contracts.

### IN GENERAL

- 70. Municipal contracts possess the same essential elements, and are executed, enforced, rescinded, and reformed under the same general doctrines, as those governing contracts between individuals.

The fundamental doctrines of the law of contracts, and especially those governing the contracts of corporations as set forth in the standard text-books and declared and enforced by the courts, are generally applicable to all municipal contracts; they need not be here stated. Within the scope of its charter powers and in the manner permitted by law, a municipal corporation may enter into contract relations with other persons, having the same general effect and obligation as those of a private corporation or a natural person,<sup>1</sup> and for

<sup>1</sup> 1 Dill. Mun. Corp. § 935; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587; City of Louisville v. President, etc., of University of Louisville, 15 B. Mon. (54 Ky.) 642; The Maggie P. (C. C.) 25 Fed. 202; Pullman v. Mayor, etc., of City of New York, 54 Barb. (N. Y.) 169.

breach of such contract it will incur similar liability.<sup>2</sup> The courts will enforce such contracts and redress the breach thereof, either for or against the municipal corporation, in the same manner and to the same extent as other contracts between other classes of persons.<sup>3</sup> These general doctrines of law, therefore, are to be considered and applied in formulating, interpreting, and enforcing municipal contracts, and in protecting rights and redressing wrongs of the parties thereto.

### SUBJECT-MATTER

71. Municipal contracts, whether made under express, implied, or inherent power to contract, must necessarily be confined to such subjects only as are usually proper and essential for performance of the corporate functions of the municipality.

It is obvious that a municipal corporation may not engage in business and make contracts on all sorts of subjects, as may a natural person.<sup>4</sup> It may not, like a private corporation, engage in profit making, except in such municipal affairs as are specially authorized.<sup>5</sup> The general power to contract and be contracted with, usually expressed in the municipal charter, is impliedly restricted to such purposes as are solely municipal.<sup>6</sup> But the public purposes for which cities may incur lia-

<sup>2</sup> Wells v. Mayor, etc., of City of Atlanta, 43 Ga. 67; City of Galveston v. Loonie, 54 Tex. 517; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; City of New Orleans v. Wardens of Church of St. Louis, 11 La. Ann. 244.

<sup>3</sup> City of Buffalo v. Bettinger, 76 N. Y. 393; City of Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557.

<sup>4</sup> 1 Dill. Mun. Corp. § 443; Village of Kent v. Dithridge & Smith Cut-Glass Co., 10 Ohio Cir. Ct. R. 629.

<sup>5</sup> Goodrich v. City of Detroit, 12 Mich. 279; City of Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557; Smith v. Stephan, 66 Md. 381, 7 Atl. 561, 10 Atl. 671; City of Galveston v. Loonie, 54 Tex. 517. Herein are public utilities, such as water and light.

<sup>6</sup> Wells v. Mayor, etc., of City of Atlanta, 43 Ga. 67; Miller v. City of Milwaukee, 14 Wis. 642; City of Wyandotte v. Zeitz, 21 Kan.

bility are not necessarily restricted to those for which precedents can be found. The general test to be applied to municipal contracts is whether or not the thing to be accomplished will promote or aid in local government. If it will secure this end, and the power is exercised in the manner prescribed by law, the contract is binding on the municipality as well as on the persons who contract with it.<sup>7</sup> A municipality, therefore, though it may contract with regard to not only its strictly public functions, but also with regard to such municipal matters as lights, water, and power for the use of itself and its inhabitants, has no authority to embrace within its contracts such subject-matter as manufacturing,<sup>8</sup> extraterritorial railway construction and operation,<sup>9</sup> merchandising,<sup>10</sup> nor to become surety,<sup>11</sup> nor issue a circulating medium,<sup>12</sup> unless specially conferred.

<sup>7</sup> 649. A public corporation cannot make a contract to provide an entertainment for its citizens and guests. *Commonwealth v. Gingrich*, 21 Pa. Super. Ct. 286.

<sup>8</sup> *Hamilton v. City of Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007; *Sun Printing & Publishing Ass'n v. City of New York*, 8 App. Div. 230, 40 N. Y. Supp. 607; *McBean v. City of Fresno*, 112 Cal. 159, 44 I.ac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191.

<sup>9</sup> *Cook v. Sumner Spinning & Mfg. Co.*, 1 Sneed (Tenn.) 698; *Star-in v. Town of Genoa*, 23 N. Y. 439; *Pitzman v. Village of Freeburg*, 92 Ill. 111; *Reed v. City of Anoka*, 85 Minn. 294, 88 N. W. 981. And see *City of Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737, holding that a city could not give money to aid in the establishment of a factory.

<sup>10</sup> *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. Ed. 85; *Welch v. Post*, 99 Ill. 471. But this power has often been specially conferred by statute, notably upon the city of Cincinnati to construct the Cincinnati Southern Railway outside of Ohio. See, also, *Nichol v. Mayor*, etc., of Town of Nashville, 9 Humph. (Tenn.) 252.

<sup>11</sup> 1 Dill. Mun. Corp. § 161. In *CITY OF FERGUS FALLS v. FERGUS FALLS HOTEL CO.*, 80 Minn. 165, 83 N. W. 54, 50 L. R. A. 170, 81 Am. St. Rep. 249, *Cooley, Cas. Mun. Corp.* 196, a contract by which a city loaned \$10,000 to a hotel company, taking a mortgage as security, was held invalid.

<sup>12</sup> *Clark v. City of Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294.

<sup>12</sup> *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *Par-*

## CONTRACTING AGENCIES

72. Municipal contracts are necessarily made for the corporation by its duly constituted and authorized agencies, which may be either the council or designated boards or individuals.

The common council is usually the proper general agent of the municipality to express the agreement essential to a valid contract,<sup>13</sup> and in the absence of express provision this power cannot be delegated.<sup>14</sup> Such agreement is usually expressed either by ordinance or resolution upon the municipal record. The formal execution of the memorandum or indenture of contracts is usually committed to the mayor and recorder or other appropriate executive officer.<sup>15</sup> In some cities the power to make and execute municipal contracts is usually conferred upon special boards, bureaus, or officers having special authority and superintendence over particular corporate functions and matters.<sup>16</sup> With regard to these the fundamental rule is that such boards, bureaus, and officers are special agents only, and have no power to make contracts binding upon the municipality outside the limitation of their particular func-

sons v. Inhabitants of Monmouth, 70 Me. 262; Cheeney v. Inhabitants of Town of Brookfield, 60 Mo. 53; State Board of Education v. City of Aberdeen, 56 Miss. 518; City of Chicago v. Fraser, 60 Ill. App. 404.

<sup>13</sup> 1 Dill. Mun. Corp. §§ 242, 259, 270; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587; Times Pub. Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465; Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841; Rens v. City of Grand Rapids, 73 Mich. 237, 41 N. W. 263; Coleman v. Town of Hartford, 157 Ala. 550, 47 South. 594.

<sup>14</sup> JEWELL BELTING CO. v. VILLAGE OF BERTHA, 91 Minn. 9, 97 N. W. 424, Cooley, Cas. Mun. Corp. 168.

<sup>15</sup> Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125.

<sup>16</sup> People ex rel. French v. Town, 1 App. Div. 127, 37 N. Y. Supp. 864; United New Jersey Railroad Canal Co. v. National Docks & N. J. J. Connecting Ry. Co., 57 N. J. Law, 523, 31 Atl. 981; Elliott, Mun. Corp. § 252.

tions.<sup>17</sup> Moreover, persons contracting with the municipality are bound to take notice of the limits of the agent's authority;<sup>18</sup> and a contract made by a public agent within the apparent scope of his powers does not bind his principal in the absence of actual authority.<sup>19</sup> But if the contract is made by the common council as general agent of the municipality, and within the scope of the corporate powers, express or implied, the authority as agent may be presumed.<sup>20</sup> The municipality is not bound by the erroneous opinion or false representation of the agent with regard to his authority;<sup>21</sup> and

<sup>17</sup> *New Decatur v. Berry*, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827; *Marion Water Co. v. City of Marion*, 121 Iowa, 306, 96 N. W. 888; *City of Chicago v. Duffy*, 117 Ill. App. 261; *City of St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; *Bonesteel v. Mayor, etc., of City of New York*, 22 N. Y. 162; *Hudson v. Mayor, etc., of City of Marietta*, 64 Ga. 286; *Starkey v. City of Minneapolis*, 19 Minn. 203 (Gil. 166); *Gates v. Hancock*, 45 N. H. 528; *Sullivan v. City of Leadville*, 11 Colo. 483, 18 Pac. 736.

<sup>18</sup> *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *Parsel v. Barnes*, 25 Ark. 261; *Hamilton v. City of Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007; *Rens v. City of Grand Rapids*, 73 Mich. 237, 41 N. W. 263; *Cheeney v. Inhabitants of Town of Brookfield*, 60 Mo. 53; *Osgood v. City of Boston*, 165 Mass. 281, 43 N. E. 108; *Pryor v. City of Kansas*, 153 Mo. 135, 54 S. W. 499; *Kerr v. City of Bellefontaine*, 59 Ohio St. 446, 52 N. E. 1024; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250, 90 N. W. 746. Persons contracting with a municipal corporation are bound to know whether the municipality has power to make such contract. *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588; *Raton Waterworks Co. v. Town of Raton*, 9 N. M. 70, 49 Pac. 898.

<sup>19</sup> *Hodges v. City of Buffalo*, 2 Denio (N. Y.) 110; *Rensselaer County Sup'r's v. Bates*, 17 N. Y. 242; *Board of Com'r's of Tippecanoe County v. Cox*, 6 Ind. 403; *Trustees of Bellevue v. Hohn*, 82 Ky. 1; *Willoughby v. City of Florence*, 51 S. C. 462, 29 S. E. 242; *Town of Madison v. Newsome*, 39 Fla. 149, 22 South. 270; *Kerr v. City of Bellefontaine*, 59 Ohio St. 446, 52 N. E. 1024; *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499.

<sup>20</sup> This presumption results from the fact of the general authority of the council to execute all contractual powers of the municipality, not expressly withheld from it, and conferred upon special agencies.

<sup>21</sup> *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Farnsworth v. Town Council of Pawtucket*, 13 R. I. 82; *Overseers of Poor of Norwich v. Overseer*

it has been held that the presumption of his authority will not be indulged, nor will the contract be made binding from the mere silence or acquiescence of the citizens or the common council of a municipality.<sup>22</sup>

### MODE OF CONTRACTING

73. Wherever the mode of negotiating and executing a municipal contract is plainly and specially prescribed and limited, such mode is exclusive and must be substantially pursued; else the municipality will not be bound by the contract.

Explicit restrictions and directions as to the manner of negotiating and executing municipal contracts are generally to be found in municipal charters or the statutes authorizing particular contracts. These provisions are inserted as safeguards against public extravagance and private greed. A few cases have held such instructions to be directory only,<sup>23</sup> but the great body of the decisions concur in declaring such statutory directions as to the method and form of negotiating and executing municipal contracts to be mandatory and peremptory.<sup>24</sup>

of Poor of Town of Pharsalia; 15 N. Y. 341; Inhabitants of Congressional Tp. No. 11 v. Weir, 9 Ind. 224; Trustees of Belleview v. Hohn, 82 Ky. 1.

<sup>22</sup> Loker v. Inhabitants of Brookline, 13 Pick. (Mass.) 343; Allegheny City v. McClurkan, 14 Pa. 81. But see Rogers v. Burlington, 3 Wall. (U. S.) 654, 672, 18 L. Ed. 79; Bissell v. Jeffersonville, 24 How. (U. S.) 300, 16 L. Ed. 664; State ex rel. Garrett v. Van Horne, 7 Ohio St. 331; Butler v. Dunham, 27 Ill. 477.

<sup>23</sup> Kelley v. Mayor, etc., of City of Brooklyn, 4 Hill (N. Y.) 263; Maddox v. Graham, 2 Metc. (Ky.) 56.

<sup>24</sup> City of Goldsboro v. Moffett (C. C.) 49 Fed. 213; McDonald v. Mayor, etc., of City of New York, 68 N. Y. 23, 23 Am. Rep. 144; Zottman v. City and County of San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Times Pub. Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465; City of Wellston v. Morgan, 65 Ohio St. 219, 62 N. E. 127; City of Bryan v. Page, 51 Tex. 532, 32 Am. Rep. 637; Carron v. Martin, 26 N. J. Law, 594, 69 Am. Dec. 584; Littlefield v. Boston & A. R. Co.,

The language of Chief Justice Marshall on this subject has met with general judicial approval: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."<sup>25</sup> Modern decisions have established the law to be that contracts of municipal corporations need not be under seal unless the charter or other legislative enactment so requires;<sup>26</sup> and so it has been held that a municipality may be bound to a contract by ordinance or by a resolution of the common council,<sup>27</sup> or even by parol agreement made through a duly authorized agency.<sup>28</sup> Where the

146 Mass. 268, 15 N. E. 648; *Montgomery County v. Barber*, 45 Ala. 237; *City of Terre Haute v. Lake*, 43 Ind. 480; *State ex rel. Reed v. Marion County Com'rs*, 21 Kan. 419; *Francis v. City of Troy*, 74 N. Y. 338; *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *White v. City of New Orleans*, 15 La. Ann. 667; *Terhune v. City of Passaic*, 41 N. J. Law, 90; *Moreland v. City of Passaic*, 63 N. J. Law, 208, 42 Atl. 1058; *Fulton v. City of Lincoln*, 9 Neb. 358, 2 N. W. 724; *Town of Durango v. Pennington*, 8 Colo. 257, 7 Pac. 14; *Worthington v. City of Covington*, 82 Ky. 265.

<sup>25</sup> *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127, 2 L. Ed. 229.

<sup>26</sup> <sup>1</sup> *Dill. Mun. Corp.* § 450, citing *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812; *Halbut v. Forrest City*, 34 Ark. 246. See, also, *Sheffield School Tp. v. Andress*, 56 Ind. 157; *City of Gadsboro v. Moffett* (C. C.) 49 Fed. 213; *Trustees of Alabama University v. Moody*, 62 Ala. 389; *Merrick v. Burlington & W. Plank Road Co.*, 11 Iowa, 75; *Clark v. Washington*, 12 Wheat. (U. S.) 40, 6 L. Ed. 544; *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; *Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. 872.

<sup>27</sup> *Fanning v. Gregoire*, 16 How. (U. S.) 524, 14 L. Ed. 1043; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

<sup>28</sup> *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361; *City of Selma v. Mullen*, 46 Ala. 411; *Mayor, etc., of City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Baker v. Johnson County*, 33 Iowa, 151; *Fanning v. Gregoire*, 16 How. (U. S.) 524, 14 L. Ed. 1043; *Reed v. Town of Orleans*, 1 Ind. App. 25, 27 N. E. 109; *Duncombe v. City of Ft. Dodge*, 38 Iowa, 281; *Clark v. Washington*, 12 Wheat. (U. S.) 40, 6 L. Ed. 544. See *Jackson Electric Ry., Light & Power Co. v. Adams*, 79 Miss. 408, 30 South. 694.

charter provides that contracts for specific purposes shall be made by ordinance or resolution of the council, such provision is mandatory,<sup>29</sup> though it is usually provided that the actual execution or signing of the contract shall be by certain officers designated for that purpose.<sup>30</sup>

### LETTING OF CONTRACTS

74. The mode of letting a municipal contract is usually prescribed by the Legislature, and, when so prescribed, must be pursued.

The statutes and charters, though varied in phraseology, generally contain requirements, intended to secure competition, to the effect that the letting shall be upon previous advertisement, and sealed bids based on plans and specifications, and to the lowest responsible bidder.

Upon this branch of the subject a vast amount of litigation has occurred, and the reported decisions are numerous and not altogether consistent. The general result of these adjudications on the various points is as follows: (1) While the most favorable results to the public can be secured by letting all contracts by competition, contracts made without this precaution are valid, unless the charter, statutes, or ordinances prescribe the use of the competitive method.<sup>31</sup> If, however,

<sup>29</sup> BRODERICK v. CITY OF ST. PAUL, 90 Minn. 443, 97 N. W. 118, Cooley, Cas. Mun. Corp. 170; State ex rel. Patterson St. Lighting Co. v. Jones, 98 Minn. 6, 106 N. W. 963; Dey v. Mayor, etc., of Jersey City, 19 N. J. Eq. 412. But where the Legislature has authorized the municipality to contract, and does not require this to be done by ordinance, the council may contract by vote on a motion or by resolution. Jersey City v. Town of Harrison, 71 N. J. Law, 69, 58 Atl. 100.

<sup>30</sup> State v. District Court of Ramsey County, 32 Minn. 181, 19 N. W. 732.

<sup>31</sup> Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Elliot v. Minneapolis City, 59 Minn. 111, 60 N. W. 1081; Oakley v. City of Atlantic City, 63 N. J. Law, 127, 44 Atl. 651.

the charter, statutes, or ordinances provide that contracts shall be let by the competitive method, by publication of specifications asking for proposals or bids, the contract to be given to the lowest and best bidder, that method must be pursued.<sup>82</sup> It has been held, however: (1) That in case of emergency, where delay would work irreparable injury to the municipality, a bona fide contract free from fraud and favoritism, and at a reasonable price, is valid without preliminary advertisement.<sup>83</sup> (2) That plans and specifications for the contract may be either published in the advertisement or referred to as on file in a particular office, or to be furnished on application.<sup>84</sup> If published, the city is bound by the terms of the publication, and bids made thereupon are valid. So, also, of copy furnished on application.<sup>85</sup> If referred to as on file, they must be filed within a reasonable time before closing of bids, so as to allow reasonable time for examination, and thereby insure competition among bidders.<sup>86</sup>

<sup>82</sup> City of Providence v. Providence Electric Light Co., 122 Ky. 237, 91 S. W. 664; State v. Butler, 178 Mo. 272, 77 S. W. 560; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Anderson v. Fuller, 51 Fla. 380, 41 South. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. Rep. 170; City of Chicago v. Hanreddy, 102 Ill. App. 1, affirmed 211 Ill. 24, 71 N. E. 834; Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263; Attorney General ex rel. Allis-Chalmers Co. v. Public Lighting Commission of City of Detroit, 155 Mich. 207, 118 N. W. 935; Fairbanks, Morse & Co. v. City of North Bend, 68 Neb. 560, 94 N. W. 537; City of Lancaster v. Miller, 58 Ohio St. 558, 51 N. E. 52; Warren v. Street Com'rs of City of Boston, 181 Mass. 6, 62 N. E. 951; McCloud v. City of Columbus, 54 Ohio St. 439, 44 N. E. 95; Leflore County v. Cannon, 81 Miss. 334, 33 South. 81; Inge v. Board of Public Works of Mobile, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20.

<sup>83</sup> North River Electric Light & Power Co. v. City of New York, 48 App. Div. 14, 62 N. Y. Supp. 726.

<sup>84</sup> Bozarth v. McGilicuddy, 19 Ind. App. 26, 47 N. E. 397; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; CHIPPEWA BRIDGE CO. v. CITY OF DURAND, 122 Wis. 85, 99 N. W. 608, 106 Am. St. Rep. 931, Cooley, Cas. Mun. Corp. 175. See Reid v. Clay, 134 Cal. 207, 66 Pac. 262; New Castle v. Rearic, 18 Pa. Super. Ct. 350.

<sup>85</sup> Moreland v. City of Passaic, 63 N. J. Law, 208, 42 Atl. 1058.

<sup>86</sup> Smith v. City of Syracuse, 17 App. Div. 63, 44 N. Y. Supp. 852;

A requirement that material be manufactured by a particular firm is invalid,<sup>37</sup> and, where new material is advertised for, secondhand material cannot be accepted.<sup>38</sup> (3) That bids must remain sealed until the day specified for opening them, to the end that the municipality may have the benefit of fair competition among the bidders;<sup>39</sup> that all bids must be on file within the time limited by the advertisement,<sup>40</sup> and must be publicly opened at the place, and by the officer, prescribed by statute, or in charge of the biddings;<sup>41</sup> and also at the date prescribed, unless unavoidably delayed, in which case notice of the adjourned time for opening bids shall be given to the bidders.<sup>42</sup> A requirement of the full name of all persons interested in the bid is mandatory, and bids not conforming thereto must be rejected.<sup>43</sup> (4) That, where the advertisement

California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802 (necessity of competition); Rose v. Low, 85 App. Div. 461, 83 N. Y. Supp. 598; Fairbanks, Morse & Co. v. City of North Bend, 68 Neb. 560, 94 N. W. 537; Warren v. Street Com'rs of City of Boston, 181 Mass. 6, 62 N. E. 951.

<sup>37</sup> Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205; Burgess v. City of Jefferson, 21 La. Ann. 143; National Surety Co. v. Kansas City Hydraulic Press Brick Co., 73 Kan. 196, 84 Pac. 1034; Gleunon v. Gates, 136 Mo. App. 421, 118 S. W. 98; Smith v. Syracuse Imp. Co., 161 N. Y. 484, 55 N. E. 1077; Contra, Hobart v. City of Detroit, 17 Mich. 246, 97 Am. Dec. 185.

<sup>38</sup> Lake Shore Foundry Co. v. Cleveland, 8 Ohio Cir. Ct. R. 671.

<sup>39</sup> People ex rel. Rodgers v. Coler, 35 App. Div. 401, 54 N. Y. Supp. 785.

<sup>40</sup> Williams v. Bergin, 129 Cal. 461, 62 Pac. 59; Addis v. City of Pittsburgh, 85 Pa. 379; City of Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483; Fairbanks, Morse & Co. v. City of North Bend, 68 Neb. 560, 94 N. W. 537.

<sup>41</sup> People ex rel. Rodgers v. Coler, 35 App. Div. 401, 54 N. Y. Supp. 785. Where the statute requires that the bids be publicly opened by the officer advertising for them, a street commissioner advertising for bids for public improvements being absent from his office at the time set for opening them, the opening of the bids by his secretary is a nullity. City of Newport News v. Potter, *supra*.

<sup>42</sup> Cass Farm Co. v. City of Detroit, 124 Mich. 433, 83 N. W. 108; Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; McCord v. Lauterbach, 91 App. Div. 315, 86 N. Y. Supp. 503.

<sup>43</sup> State ex rel. Strack v. Ratterman, 18 Ohio Cir. Ct. R. 36.

promises a contract to the lowest bidder, the authority in control of the biddings may reject all bids unless otherwise peremptorily directed by the charter,<sup>44</sup> and no right of action will lie against the city for anticipated profits of the contract.<sup>45</sup> Where the publication is for the lowest responsible bidder, discretion as to responsibility rests with the municipality;<sup>46</sup> but this discretion is not arbitrary,<sup>47</sup> and the bidder is not to be selected as responsible because alone of the value of his property or his ability to pay money,<sup>48</sup> but upon his ability to re-

<sup>44</sup> Elliot v. Minneapolis City, 59 Minn. 111, 60 N. W. 1081; Brown v. City of Houston (Tex. Civ. App.) 48 S. W. 760; CHIPPEWA BRIDGE CO. v. CITY OF DURAND, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 981; Cooley, Cas. Mun. Corp. 175; Starkey v. City of Minneapolis, 19 Minn. 203 (Gil. 166); City of Erie v. Bier, 10 Pa. Super. Ct. 381. Cf. State v. Payssan, 47 La. Ann. 1029, 17 South. 481, 49 Am. St. Rep. 390. See, also, Trapp v. Newport, 115 Ky. 840, 74 S. W. 1109, 25 Ky. Law Rep. 224; Trowbridge v. Hudson, 24 Ohio Cir. Ct. R. 76; City of Corry v. Corry Chair Co., 18 Pa. Super. Ct. 271; People ex rel. Assyrian Asphalt Co. v. Kent, 160 Ill. 655, 43 N. E. 760. It has been held that a provision that contracts for public improvements shall be let to the lowest responsible bidder, is mandatory. Inge v. Board of Public Works of Mobile, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20. But see Brown v. City of Houston (Tex. Civ. App.) 48 S. W. 760.

<sup>45</sup> City Imp. Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; Talbot Paving Co. v. City of Detroit, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604.

<sup>46</sup> People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4; Erving v. City of New York, 131 N. Y. 133, 29 N. E. 1101; Johnson v. Sanitary Dist. of Chicago, 163 Ill. 285, 45 N. E. 213; State v. McGrath, 91 Mo. 386, 3 S. W. 846; Douglass v. Commonwealth ex rel. Senior, 108 Pa. 559; City of Chicago v. Hanreddy, 102 Ill. App. 1; Kundinger v. Saginaw, 132 Mich. 395, 93 N. W. 914; St. Louis Quarry & Construction Co. v. Frost, 90 Mo. App. 677; Kronsbein v. Rochester, 76 App. Div. 494, 78 N. Y. Supp. 813.

<sup>47</sup> McGovern v. Board of Public Works of City of Trenton, 57 N. J. Law, 580, 31 Atl. 613; People ex rel. Assyrian Asphalt Co. v. Kent, 160 Ill. 655, 43 N. E. 760; People v. Common Council of Troy, 78 N. Y. 33, 34 Am. Rep. 500. But the authority of the council to determine which is the lowest responsible bidder will not be interfered with by the court except it be shown clearly that there was fraud or collusion. Hubbard v. City of Sandusky, 9 Ohio Cir. Ct. R. 638.

<sup>48</sup> People ex rel. Assyrian Asphalt Co. v. Kent, 160 Ill. 655, 43 N.

spond to the requirements of the contract.<sup>49</sup> And no right of action lies against the municipality or the officers in control of the bidding for an honest mistake in the exercise of this discretion.<sup>50</sup> If the bids are rejected, the board may without re-advertising reconsider its action and award a contract on the original bids.<sup>51</sup> A contract let under bidding is made and executed only when a bid has been accepted by the proper agency of the municipality in the manner required by law.<sup>52</sup> (5) The contract finally entered into must in its terms correspond substantially to the terms and specifications on which proposals or bids were invited, and if it does not it is invalid.<sup>53</sup> But a departure from the terms and specifications in a matter not substantial and not for the benefit of the contractor will not invalidate the contract.<sup>54</sup>

E. 760; *City of Philadelphia v. Pemberton*, 208 Pa. 214, 57 Atl. 516; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114.

<sup>49</sup> *Interstate Vitrified Brick & Paving Co. v. City of Philadelphia*, 164 Pa. 477, 30 Atl. 383. In *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20, it was held that, in deciding on the responsibility of the bidder, it is the duty of the municipal officers to consider not only the pecuniary ability of a bidder to perform the contract, but his skill and integrity. See *People v. Kent*, *supra*; *State ex rel. McGowan Co. v. St. Bernard*, 10 Ohio Cir. Ct. R. 74; *Neiman v. St. Bernard*, 10 Ohio Cir. Ct. R. 74; *Reuting v. City of Titusville*, 175 Pa. 512, 34 Atl. 916.

<sup>50</sup> *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Talbot Paving Co. v. City of Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604.

<sup>51</sup> *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501.

<sup>52</sup> *Sullivan v. City of Leadville*, 11 Colo. 483, 18 Pac. 736.

<sup>53</sup> *DIAMOND v. CITY OF MANKATO*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448; *Cooley, Cas. Mun. Corp.* 183; *Patterson v. Barber Asphalt Pav. Co.*, 96 Minn. 9, 104 N. W. 566; *City of Mankato v. Barber Asphalt Pav. Co.*, 142 Fed. 329, 73 C. C. A. 439; *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20; *Le Tourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115.

<sup>54</sup> *City of Mankato v. Barber Asphalt Pav. Co.*, 142 Fed. 329, 73 C. C. A. 439.

### VALIDITY IN GENERAL

75. The validity of municipal contracts is determined by the same rules that apply to all contracts; but in addition thereto there are certain special rules that restrict or limit the powers of a municipality to contract, and which must be applied when the validity of such contracts is in question.

The rules applied to contracts generally in determining their validity are applied to the contracts of municipal corporations. Such contracts, equally with those of private persons, are subject to the principle that, to constitute a contract, the minds of the parties must meet as to both the subject-matter and the terms.<sup>55</sup> So, too, a municipal contract may be declared void on the ground of fraud.<sup>56</sup> But, in addition to these general considerations, there are certain special rules, growing out of the public nature of the municipality and its peculiar relations to the state and to the people, that affect the validity of its contracts. The most important phase of the question arises when the validity of the contract is attacked on the ground that it is wholly beyond the powers of the municipality, or, as it is usually expressed, that the contract is ultra vires. This phase of the question will be discussed in a subsequent section.<sup>57</sup> So, too, because of the relations which the municipality and its officers bear to the public, municipal contracts are affected by very strict rules for determining their legality or illegality.<sup>58</sup>

Moreover, the very nature of a municipal corporation as a public agency, the principal purpose of which is to secure to the people local self-government, brings into operation a

<sup>55</sup> McCotter v. Mayor, etc., of City of New York, 37 N. Y. 325; Jersey City v. Town of Harrison, 72 N. J. Law, 185, 62 Atl. 765, 65 Atl. 507.

<sup>56</sup> Byers v. Manley Mfg. Co. (Tenn. Ch.) 46 S. W. 547.

<sup>57</sup> See post, § 77.

<sup>58</sup> See post, § 81.

large number of special rules, an enumeration of which, even, would be beyond the scope of the present discussion. They must be sought for in the decisions. Nevertheless, this rule may be said to be fundamental, namely, that the test of the validity of a contract made by a municipal corporation is whether or not the thing to be accomplished will promote or aid in local government. If it will secure this end and is otherwise unobjectionable, the courts will hesitate to declare it invalid.<sup>59</sup>

So, too, it may be observed that, as a resort to taxation is necessary when there is no special fund for discharging a municipal obligation, the power of a municipality to contract is, as a general rule, limited by the purposes for which taxes may be levied.<sup>60</sup>

#### TERM AND DURATION OF CONTRACT—POWER TO BIND SUCCESSORS

76. In the absence of any limitation in the charter or statutes, a municipal corporation may bind itself by contract for any reasonable term of years, but not in perpetuo. And so long as there is no attempt to restrict the legislative power of future councils, the city council may bind its successors by contracts for legitimate public purposes.

While a municipal council may not by contract abrogate or forego, for itself or for its successors, any of its legislative functions,<sup>61</sup> or embarrass or restrict its successors in their con-

<sup>59</sup> *Hamilton v. City of Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007. And see *Thomas v. City of Port Huron*, 27 Mich. 320.

<sup>60</sup> *Sutherland-Innes Co. v. Village of Evart*, 86 Fed. 597, 30 C. C. A. 305; *MANNING v. CITY OF DEVILS LAKE*, 13 N. D. 47, 99 N. W. 51, 65 L. R. A. 187, 112 Am. St. Rep. 652, Cooley, Cas. Mun. Corp. 332.

<sup>61</sup> *Brick Presbyterian Church Corp. v. Mayor, etc., of City of New York*, 5 Cow. (N. Y.) 538; *Britton v. Mayor, etc., of New York*, 21 How. Prac. (N. Y.) 251; *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R.

trol of matters of public interest and concern,<sup>62</sup> yet the power of a council to bind its successors for a reasonable time by contracts for a term of years has been recognized with regard to water supply,<sup>63</sup> lighting,<sup>64</sup> street car fares,<sup>65</sup> the issuance of municipal bonds,<sup>66</sup> and some other public purposes. On the other hand, it is generally conceded that a city council cannot bind its successors by contracts for personal or professional services.<sup>67</sup>

The limit of time for which contracts may be made is sometimes fixed by charter or statute.<sup>68</sup> In the absence of any such limitation, contracts for water, lighting, etc., have been sustained as valid when made for a long term of years, twenty,<sup>69</sup> twenty-five,<sup>70</sup> and even thirty<sup>71</sup> years, being held not

A. 656; *City of Marshall v. Allen* (Tex. Civ. App.) 115 S. W. 849. And see *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

<sup>62</sup> *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143; *Martin v. Mayor, etc., of City of Brooklyn*, 1 Hill (N. Y.) 545.

<sup>63</sup> *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325; *State ex rel. Great Falls Waterworks v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15. See *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

<sup>64</sup> *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Blood v. Manchester Electric Light Co.*, 68 N. H. 340, 39 Atl. 335; *Tanner v. Town of Auburn*, 37 Wash. 38, 79 Pac. 494.

<sup>65</sup> *City of Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

<sup>66</sup> *Edward C. Jones Co. v. Town of Guttenberg*, 66 N. J. Law, 659, 51 Atl. 274.

<sup>67</sup> *City of Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543; *Emmert v. De Long*, 12 Kan. 67.

<sup>68</sup> *Defiance Water Co. v. City of Defiance* (C. C.) 90 Fed. 753 (20 years); *Gaslight & Coke Co. v. City of New Albany*, 156 Ind. 406, 59 N. E. 176 (10 years).

<sup>69</sup> *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

<sup>70</sup> *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485.

<sup>71</sup> *Hurley Water Co. v. Town of Vaughn*, 115 Wis. 470, 91 N. W. 971; *Little Falls Electric & Water Co. v. City of Little Falls* (C. C.)

to be unreasonable. But a contract granting a franchise or binding the city for all future time is unreasonable and void.<sup>72</sup>

In some instances, where the term of the contract has exceeded the statutory or charter limit, the courts have held the contracts valid, nevertheless, for the statutory period,<sup>73</sup> or for a reasonable time.<sup>74</sup> Some courts have, however, held the contracts absolutely void.<sup>75</sup>

### ULTRA VIRES CONTRACTS

77. The capacity of the municipal corporation to make a binding contract is dependent upon power, express or implied, conferred upon it by its charter; and contracts made by a municipality repugnant to or outside of the scope of its charter are ultra vires and void.

Much confusion and discord appears in the decisions and text-books on Corporations in the discussion of questions involving the doctrine of "ultra vires." This confusion results chiefly from the use of the term in different senses. The term "ultra vires" has been used to characterize, not only acts which are repugnant to or beyond the corporate powers, but also acts

102 Fed. 663; Reed v. City of Anoka, 85 Minn. 294, 88 N. W. 981, distinguishing Flynn v. Little Falls Electric & Water Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

<sup>72</sup> WESTMINSTER WATER CO. v. CITY OF WESTMINSTER, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424, Coolley, Cas. Mun. Corp. 186; State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; City of Wellston v. Morgan, 59 Ohio St. 147, 52 N. E. 127.

<sup>73</sup> Defiance Water Co. v. City of Defiance (C. C.) 90 Fed. 753.

<sup>74</sup> Columbus Waterworks Co. v. City of Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354.

<sup>75</sup> Manhattan Trust Co. v. City of Dayton, 59 Fed. 327, 8 C. C. A. 140.

which, though within the corporate powers, are beyond the authority of the officers or agents doing them.<sup>76</sup> Strictly speaking, the term should be applied to acts of the first class only; that is, to acts which are wholly repugnant to or beyond the corporate powers.<sup>77</sup> And to avoid confusion it is in that sense, and that only, that the term is used in this chapter; that is to say, the contracts of municipal corporations are properly described as ultra vires only when they are not within the scope of the powers of the corporation to make under any circumstances or for any purpose. If the contract is within the power of the corporation to make, but in respect to which there has been some irregularity or defect in the actual exercise of the power, in some particular or through some undisclosed circumstance affecting that individual contract, it is merely an unauthorized or irregular contract and not ultra vires in the true sense.<sup>78</sup>

The doctrine of ultra vires has been stated by a distinguished federal judge in the following lucid and comprehensive statement: "Two propositions are settled: One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which creates it consents, ultra vires \* \* \* ; the other is that the powers of a corporation are such, and such only, as its charter confers, and an act beyond the measure of these powers, as either expressly stated or fairly implied, is ultra vires. \* \* \* These two propositions embrace the whole doctrine of ultra vires; they

<sup>76</sup> Reese, Ultra Vires, § 17; *BELL v. KIRKLAND*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, Cooley, Cas. Mun. Corp. 190; *Demarest v. Inhabitants of New Barbadoes Tp.*, in Bergen County, 40 N. J. Law, 604.

<sup>77</sup> *BELL v. KIRKLAND*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, Cooley, Cas. Mun. Corp. 190.

<sup>78</sup> *BELL v. KIRKLAND*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, Cooley, Cas. Mun. Corp. 190. See, also, *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

are its Alpha and Omega."<sup>79</sup> To escape the apparent injustice of enforcing this doctrine in regard to the dealings and doings of private corporations, the courts have apparently in many instances either ignored or evaded its full force and meaning, and have thus shown "how hard cases can make bad law."<sup>80</sup> This has not been so, however, with regard to contracts of public corporations.<sup>81</sup> Generally, the courts have recognized as a truism that what a municipality has no power to do it has not done merely because it tried to do it, and have accordingly refused to give legal effect to ultra vires contracts.<sup>82</sup>

The courts have, too, been inclined to give full effect to the rule that persons dealing with a municipal corporation, whose powers are defined and limited by law, are bound to take notice of such limitations.<sup>83</sup>

<sup>79</sup> Mr. Justice Brewer, dissenting in Chicago, R. I. & P. R. Co. v. Union Pac. Ry. Co. (C. C.) 47 Fed. 15. Properly, ultra vires means beyond the powers of the corporation itself. Camden & A. R. Co. v. May's Landing, etc., R. Co., 48 N. J. Law, 530, 7 Atl. 523.

<sup>80</sup> Wright v. Pipe Line Co., 101 Pa. 204, 47 Am. Rep. 701; Towers Excelsior & Ginnery Co. v. Inman, 96 Ga. 506, 23 S. E. 418; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; Portland Lumbering & Mfg. Co. v. City of East Portland, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 259; Dewey v. Toledo, A. A. & N. M. Ry. Co., 91 Mich. 351, 51 N. W. 1063; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412.

<sup>81</sup> Dill. Mun. Corp. § 457.

<sup>82</sup> Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; Seibrecht v. City of New Orleans, 12 La. Ann. 496; Hague v. City of Philadelphia, 48 Pa. 527; Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; BELL v. KIRKLAND, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, Cooley, Cas. Mun. Corp. 190; Field v. City of Shawnee, 7 Okl. 73, 54 Pac. 318; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Burrill v. Boston, 2 Cliff. 590, Fed. Cas. No. 2,198; City of Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; McDonald v. Mayor, etc., of City of New York, 68 N. Y. 23, 23 Am. Rep. 144; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Mitchell v. City of Rockland, 41 Me. 363, 66 Am. Dec. 252.

<sup>83</sup> Scott v. City of Laporte, 162 Ind. 34, 68 N. E. 278; Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co., 80

*Illustrations*

No public corporation may in any way alienate or surrender the trust powers conferred upon it for the public welfare.<sup>84</sup> Contracts by which a municipality attempts to restrict its legislative power,<sup>85</sup> or to embarrass or restrict its future control over a matter of public interest,<sup>86</sup> or to abrogate any of its public functions,<sup>87</sup> are ultra vires. So it has been declared that contracts by which a municipality gave away or exchanged city streets for other property,<sup>88</sup> offered a reward for the apprehension of a person,<sup>89</sup> borrowed money to pay the expenses of an election contest over the removal of a county seat,<sup>90</sup> or to make loans and donations to colleges,<sup>91</sup> are ultra vires, and not enforceable at law. A contract to indemnify

Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *City of Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.

<sup>84</sup> *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Bush v. City of Portland*, 19 Or. 45, 23 Pac. 667, 20 Am. St. Rep. 789; *Wabasha R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

<sup>85</sup> *Brick Presbyterian Church Corp. v. City of New York*, 5 Cow. (N. Y.) 538; *Britton v. Mayor, etc., of New York*, 21 How. Prac. (N. Y.) 251; *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *City of Marshall v. Alleh* (Tex. Civ. App.) 115 S. W. 849.

<sup>86</sup> *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143; *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *City of Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543; *WESTMINSTER WATER CO. v. CITY OF WESTMINSTER*, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424, *Cooley, Cas. Mun. Corp.* 186.

<sup>87</sup> *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143; *Martin v. Mayor, etc., of City of Brooklyn*, 1 Hill (N. Y.) 545; *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

<sup>88</sup> *Beebe v. City of Little Rock*, 68 Ark. 39, 56 S. W. 791.

<sup>89</sup> *Hanger v. City of Des Moines*, 52 Iowa, 193, 2 N. W. 1105, 35 Am. Rep. 266; *Patton v. Stephens*, 14 Bush (Ky.) 324; *City of Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822. *Contra*, *Borough of York v. Forscht*, 23 Pa. 391.

<sup>90</sup> *Myers v. City of Jeffersonville*, 145 Ind. 431, 44 N. E. 452.

<sup>91</sup> *City of Fulton v. Northern Illinois College*, 158 Ill. 333, 42 N. E. 138.

risks for individuals or other corporations; <sup>92</sup> a contract for the purchase by a city of a right of way for a railroad; <sup>93</sup> a contract granting a monopoly of the streets to a water company; <sup>94</sup> a contract to pay money to aid in the erection of a county courthouse, or to donate real estate for that purpose; <sup>95</sup> a contract to pay money to aid in building a shoe factory within the city limits; <sup>96</sup> a promise not to extend a certain street <sup>97</sup>—have been declared ultra vires. These and many other similar contracts the courts have refused to enforce or recognize, because they were illegal restrictions of the public power and duty of the municipality, or because they were beyond the scope of the municipal powers. Some earlier cases were not in accord with these decisions, but supported the unlawful contract upon the doctrine of estoppel, so often applied formerly to the contracts of private corporations.<sup>98</sup> But there is at present general concurrence in the doctrine that the law will not recognize or enforce a municipal contract which it does not authorize.<sup>99</sup> Parties, therefore, seeking recompense for money loaned, material furnished, or labor done for a municipal corporation under an ultra vires contract, do not sue for breach of the contract or seek specific performance

<sup>92</sup> Wheeler v. City of Sault Ste. Marie, 164 Mich. 338, 129 N. W. 685, 35 L. R. A. (N. S.) 547.

<sup>93</sup> Strahan v. Town of Malvern, 77 Iowa, 454, 42 N. W. 369.

<sup>94</sup> Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

<sup>95</sup> Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193; Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822.

<sup>96</sup> City of Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737.

<sup>97</sup> Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42, 33 N. W. 15.

<sup>98</sup> Clark, Priv. Corp. pp. 179-183, § 67.

<sup>99</sup> City of Eufaula v. McNab, 67 Ala. 588, 42 Am. Rep. 118; Cowdrey v. Town of Caneadea (C. C.) 16 Fed. 532; City of Ft. Wayne v. Lehr, 88 Ind. 62; Schneider v. Menasha, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

thereof, but seek recompense either upon the theory of an implied contract and assumpsit, or under some doctrine of equity.<sup>1</sup>

### SAME—RATIFICATION AND ESTOPPEL

**78.** Municipal contracts which are within the scope of corporate powers, but which are defective because of irregularity in the method of their execution, or unlawful because of a secret purpose of the corporation, are not void, but are subjects of ratification and estoppel.

Contracts which, though within the scope of the corporate powers, are irregular because of some defect in the proceedings by which they were made or in the mode of their execution, and contracts within the scope of corporate powers, but made for some private purpose not permitted by the charter, have often been called "ultra vires contracts," but they are not within the definition given in the last section.<sup>2</sup> Such contracts may be originally invalid because of insufficient notice, defective execution, informality, or some other irregularity in the exercise of power confessedly possessed by the corporation;<sup>3</sup> or such unquestioned power may be used by the corporation secretly for some purpose for which it has not been granted, as to borrow money and execute bonds for payment of current expenses of the municipality when the lender supposed it was to be applied to lawful purposes.<sup>4</sup> Such con-

<sup>1</sup> *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Schneider v. Menasha*, *supra*; *Thomson v. Town of Elton*, 109 Wis. 589, 85 N. W. 425.

<sup>2</sup> *BELL v. KIRKLAND*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, Cooley, *Cas. Mun. Corp.* 190.

<sup>3</sup> *Moore v. Mayor*, etc., of City of New York, 73 N. Y. 238, 29 Am. Rep. 134; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

<sup>4</sup> *Curtis v. Leavitt*, 15 N. Y. 9; *Mayor, etc., of City of Nashville v. Ray*, 19 Wall. (U. S.) 468, 22 L. Ed. 164; *Gause v. Clarksville*, 5 Dill.

tracts being within the apparent scope of the corporate powers, and their defects not being obvious nor known to the other party, are generally held to be voidable only upon such terms and conditions as apply to rescission.<sup>5</sup> And so, if the corporation under a contract of this kind has obtained value from the other party, it cannot avoid or rescind the contract except upon the condition of complete restitution or recompense;<sup>6</sup> and if the municipality recognizes such contract, with full knowledge of the facts, it may thus waive objection and ratify the same and become bound thereby;<sup>7</sup> as, where officers or a board having no authority therefor make a contract for a city within the scope of its charter powers, the common council or other board empowered to make such contract may subsequently adopt or ratify the same,<sup>8</sup> just as a natural per-

165, Fed. Cas. No. 5,276; *Robertson v. Breedlove*, 61 Tex. 316; *Thomas v. City of Port Huron*, 27 Mich. 320.

<sup>5</sup> *Clark, Priv. Corp.* § 67. *Washington Female Seminary v. Washington Borough*, 18 Pa. Super. Ct. 555; *United States Water Works Co. v. Borough of Du Bois*, 176 Pa. 439, 35 Atl. 251.

<sup>6</sup> *Moore v. Mayor, etc., of City of New York*, 73 N. Y. 238, 29 Am. Rep. 134; *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71; *VILLAGE OF PILLAGER v. HEWETT*, 98 Minn. 265, 107 N. W. 815, *Cooley, Cas. Mun. Corp.* 199; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Chapman v. Douglas County*, 107 U. S. 349, 2 Sup. Ct. 62, 27 L. Ed. 378; *Leonard v. City of Canton*, 35 Miss. 189; *City of Ft. Scott v. W. G. Eads Brokerage Co.*, 117 Fed. 51, 54 C. C. A. 437; *City of Chicago v. Norton Milling Co.*, 97 Ill. App. 651; *Id.*, 196 Ill. 580, 63 N. E. 1043; *City of Newport v. Phillips (Ky.)* 40 S. W. 378; *Warner v. City of New Orleans*, 87 Fed. 829, 31 C. C. A. 238; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Paul v. City of Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Thomas v. City of Port Huron*, 27 Mich. 328.

<sup>7</sup> *Albany City Nat. Bank v. City of Albany*, 92 N. Y. 363; *City of Philadelphia, to Use of O'Rourke, v. Hays*, 93 Pa. 72; *Lincoln v. Inhabitants of Stockton*, 75 Me. 141; *Devers v. Howard*, 88 Mo. App. 253.

<sup>8</sup> *City of Little Rock v. Merchants' Nat. Bank*, 98 U. S. 308, 25 L. Ed. 108. See, also, *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397, holding that where a de facto municipal board acting in be-

son may ratify the unauthorized contract of his agent. But some cases hold that such municipal contract is void if it be made for a purpose or object not permitted by the charter; as, for instance, if the corporation, without special authority, borrow money for the purpose of paying pre-existing indebtedness, such contract is void.<sup>9</sup>

It has been declared that the doctrine of ultra vires does not absolve municipal corporations from the principle of common honesty.<sup>10</sup> And so "where an act in its external aspects is within the general powers of a corporation, and is only unauthorized because it is done with a secret unauthorized intent, the defense of ultra vires will not prevail against a stranger who in good faith dealt with it without notice of such intent."<sup>11</sup> Also where the other contracting party has in good faith performed his part of the contract, the municipality will be held estopped from pleading the shortcomings or faults of its own officers or agents in all cases where the contract is not repugnant to or beyond the scope of the corporate power.<sup>12</sup> Generally the acceptance of benefits or use of the thing contracted for is regarded as a completion of the contract estopping the corporation from objecting on merely formal grounds.<sup>13</sup>

half of the municipality, entered into a contract which it might have made if de jure, it might afterwards on performing the acts which rendered it a board de jure, ratify the contract so as to bind the parties thereto.

<sup>9</sup> Agawam Nat. Bank v. Inhabitants of South Hadley, 128 Mass. 503.

<sup>10</sup> Bass Foundry & Machine Works v. Board of Com'rs of Parke County, 115 Ind. 234, 17 N. E. 593.

<sup>11</sup> 2 Dill. Mun. Corp. § 936.

<sup>12</sup> Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; London & N. Y. Land Co. v. Jellico, 103 Tenn. 320, 52 S. W. 995; Moore v. Mayor, etc., of City of New York, 73 N. Y. 238, 29 Am. Rep. 134; Sharp v. Teese, 9 N. J. Law, 352, 17 Am. Dec. 479.

<sup>13</sup> Abbott v. Inhabitants of Third School Dist. in Hermon, 7 Me. (7 Greenl.) 118; People ex rel. Alexander v. Swift, 31 Cal. 26; Fisher v. Inhabitants of Seventeenth School Dist. in Attleborough, 4 Cush. (Mass.) 494; Westbrook v. Middlecoff, 99 Ill. App. 327; Drainage

The principles of ratification and estoppel apply, however, only to such unauthorized contracts entered into on its behalf as the municipality could have originally authorized, especially where the invalidity consists merely of some irregularity or informality in the manner or time of its execution, so that it is incapable of enforcement.<sup>14</sup> But if there is no legal authority to contract—if the contract is ultra vires in the true sense—authority cannot be created by acquiescence or ratification, and neither estoppel nor ratification will prevent the municipality from pleading ultra vires, and thereby defeating an action brought on the contract.<sup>15</sup> So, likewise, a party sued by a municipality upon an unauthorized contract made with it may rely on the doctrine of ultra vires to defeat the action.<sup>16</sup>

#### *Mode of Ratification*

The same rules apply to ratification as to the making of contracts. No supposed ratification of an unauthorized municipal contract is binding unless such ratification is made by the

Com'rs v. Lewis, 101 Ill. App. 150; Coit v. City of Grand Rapids, 115 Mich. 493, 73 N. W. 811.

<sup>14</sup> Aspinwall-Delafield Co. v. Borough of Aspinwall, 229 Pa. 1, 77 Atl. 1098; Gallup v. Liberty County, 57 Tex. Civ. App. 175, 122 S. W. 291; Moriarty v. City of New York, 59 Misc. Rep. 204, 110 N. Y. Supp. 842.

<sup>15</sup> Mor. Priv. Corp. § 619; Ellis v. City of Cleburne (Tex. Civ. App.) 35 S. W. 495; Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Lamar Water & Electric Light Co. v. City of Lamar, 140 Mo. 145, 39 S. W. 768; Citizens' Bank of Des Moines v. City of Spencer, 126 Iowa, 101, 101 N. W. 643; Village of Reed City v. Reed City Veneer & Panel Works, 165 Mich. 599, 131 N. W. 385; CITY OF FERGUS FALLS v. FERGUS FALLS HOTEL CO., 80 Minn. 165, 83 N. W. 54, 50 L. R. A. 170, 81 Am. St. Rep. 249, Cooley, Cas. Mun. Corp. 196. Compare City of Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737; Moriarty v. City of New York, 59 Misc. Rep. 204, 110 N. Y. Supp. 842.

<sup>16</sup> Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; City Council of City of Montgomery v. Montgomery & Wetumpka Plank Road Co., 31 Ala. 76; Hodges v. City of Buffalo, 2 Denio (N. Y.) 110; Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 319, 29 Am. Dec. 543.

municipal agency authorized to make such contract.<sup>17</sup> And accordingly it has been held that where a mayor assents to a compromise of a pending suit against the city, ratifying the contract sued upon, which is entered upon the minutes of court and the suit thereupon dismissed, this formal ratification does not bind the municipality, because the mayor had no authority either to make or ratify such contract.<sup>18</sup> The power to ratify belongs generally to the common council, but it may be made by the particular municipal agency having power to make the original contract.<sup>19</sup> In order that there may be a valid ratification, there must, however, be an observance of all the conditions necessary to a valid agreement in the first instance,<sup>20</sup> though in some instances a ratification will be implied.<sup>21</sup> A valid ratification relates back and renders the contract valid from its date.<sup>22</sup>

#### SAME—CONTRACTS PARTIALLY ULTRA VIRES

**79. A contract is not of necessity entirely invalid because a portion of it is ultra vires. In such case, if the portions of the contract which are within the charter powers are separable from the ultra vires portion, the latter only is void.**

<sup>17</sup> 1 Dill. Mun. Corp. § 465; *Boston Electric Co. v. City of Cambridge*, 163 Mass. 64, 39 N. E. 787.

<sup>18</sup> *Jackson Electric Ry., Light & Power Co. v. Adams*, 79 Miss. 408, 30 South. 694; *City of Tyler v. Adams* (Tex. Civ. App.) 62 S. W. 119.

<sup>19</sup> *Delafield v. Illinois*, 2 Hill (N. Y.) 159; *Hague v. City of Philadelphia*, 48 Pa. 527; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32.

<sup>20</sup> *City of Plattsburgh v. Murphy*, 74 Neb. 749, 105 N. W. 293; *CHIPPEWA BRIDGE CO. v. CITY OF DURAND*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931, Cooley, Cas. Mun. Corp. 175.

<sup>21</sup> *City of Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954; *Borough of Tarentum v. Moorhead*, 26 Pa. Super. Ct. 273.

<sup>22</sup> *Hill v. City of Indianapolis* (C. C.) 92 Fed. 467.

This distinction has been taken in many cases, and must be regarded as settled law. In a leading case the city had made a contract for paving its streets, to do which it was fully authorized, and promised to give its negotiable bonds in payment therefor; but for this it had no authority. The work was completed, but the city refused to execute its bonds, and thereupon the contractors brought an action for damages for breach of contract against the city, which pleaded ultra vires. The court ruled that, though specific performance might not be decreed in behalf of the contractors, yet the action for damages was maintainable. The city had power to, contract for the doing of the work, and could not escape liability therefor because it had promised payment by unlawful means. "It matters not," said the court, "that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment may not be made at all; such is not the law. The contract between the parties is in force so far as it is lawful."<sup>23</sup> So, likewise, where a city having power to provide for gas contracted therefor with a private corporation, but without power so to do assumed to grant the gas company an exclusive franchise; in this case the court declared the true rule to be that "when a part of a divisible contract is ultra vires, but neither malum in se nor malum prohibitum, the remainder may be enforced."<sup>24</sup> If it appears, however, from a consideration of the whole contract, that the part which is valid is so dependent on the part which is invalid that it would not have been made independently, the whole contract must be declared void.<sup>25</sup>

<sup>23</sup> Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659.

<sup>24</sup> Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Coit v. City of Grand Rapids, 115 Mich. 493, 73 N. W. 811; City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063. And see BELL v. KIRKLAND, 102 Minn. 213, 113 N. W. 271, 18 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, Cooley, Cas. Mun. Corp. 190.

<sup>25</sup> Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637, 68 S. W. 761; Meyer v. Town of Boonville, 162 Ind. 165, 70 N. E.

**IMPLIED PROMISE**

80. A municipality may be liable in assumpsit upon an implied contract to pay value for what it has received, where it has made no express promise therefor, or has made an invalid promise which will not sustain an action.

In accordance with the general principles of the law of contracts, there are a great many cases giving redress against municipal corporations for breach of implied contracts of the municipality.<sup>26</sup> In a leading case it was declared that "the doctrine of implied municipal liability applied to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same."<sup>27</sup> This doctrine has been generally enforced in the American courts, both state and federal;<sup>28</sup> but it must not be inferred that the law will imply

146; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

<sup>26</sup> City of Bryan v. Page, 51 Tex. 532, 32 Am. Rep. 637; City of Austin v. Bartholomew, 107 Fed. 349, 46 C. C. A. 327; Maher v. City of Chicago, 38 Ill. 266; Peterson v. Mayor, etc., of City of New York, 17 N. Y. 449; Frankfort Bridge Co. v. City of Frankfort, 18 B. Mon. (Ky.) 41; City of Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa, 276; Brush Electric Light & Power Co. of Montgomery v. City Council of Montgomery, 114 Ala. 433, 21 South. 960; Buck v. City of Eureka, 124 Cal. 61, 56 Pac. 612; Fox v. City of Richmond, 40 S. W. 251, 19 Ky. Law Rep. 326; City of Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483; Tufts v. Town of Chester, 62 Vt. 358, 19 Atl. 988; Memphis Gas-Light Co. v. City of Memphis, 93 Tenn. 612, 30 S. W. 25. Where the city charter fails to provide for furnishing water and light, it has an implied power to contract for such light and water. Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65, 30 South. 289. See, also, Tucker v. Mayor, etc., of Virginia City, 4 Nev. 20; Port Jervis Waterworks Co. v. Village of Port Jervis, 151 N. Y. 111, 45 N. E. 388; Garrison v. Chicago, 7 Biss. 480, Fed. Cas. No. 5,255.

<sup>27</sup> Argenti v. City of San Francisco, 16 Cal. 255.

<sup>28</sup> Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040;

that of a contract which is strictly ultra vires, nor that the courts will raise such an implied promise as may not be expressly made.<sup>29</sup> In general, however, whenever a municipal corporation receives money or property, or accepts the benefit of labor or services rendered to it, it is bound in law to make recompense therefor.<sup>30</sup> As we have seen in the last section, its promise to pay in bonds which it has no authority to issue cannot be enforced;<sup>31</sup> but an action of assumpsit will lie to recover judgment for the amount promised in bonds, or quantum meruit, or quantum valebat.<sup>32</sup> The same action

*City of Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Schipper v. City of Aurora*, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318.

<sup>29</sup> *Agawam Nat. Bank v. Inhabitants of South Hadley*, 128 Mass. 503; *Brush Electric Light & Power Co. of Montgomery v. City Council of Montgomery*, 114 Ala. 433, 21 South. 960; *Keane v. City of New York*, 88 App. Div. 542, 85 N. Y. Supp. 130; *Citizens' Bank of Des Moines v. City of Spencer*, 126 Iowa, 101, 101 N. W. 643; *City of Detroit v. Robinson*, 38 Mich. 108; *Borough of Henderson v. County of Sibley*, 28 Minn. 515, 11 N. W. 91; *Buck v. City of Eureka*, 124 Cal. 61, 56 Pac. 612; *Burrill v. Boston*, 2 Cliff. 596, Fed. Cas. No. 2,198. A municipal corporation does not become liable for a debt by substituting the fiction of an implied contract for an express contract, void for noncompliance with the terms of a statute. *Moss v. Sugar Ridge Tp. of Clay County* (Ind. App.) 67 N. E. 460.

<sup>30</sup> *Argenti v. City of San Francisco*, 16 Cal. 255; *Schneider v. City of Menasha*, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996; *VILLAGE OF PILLAGER v. HEWETT*, 98 Minn. 265, 107 N. W. 815, *Cooley, Cas. Mun. Corp.* 199; *Central Bitulithic Pav. Co. v. City of Mt. Clemens*, 143 Mich. 259, 106 N. W. 888; *Nebraska Bitulithic Co. v. City of Omaha*, 84 Neb. 375, 121 N. W. 443; *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349; *Wentink v. Board of Chosen Freeholders of County of Passaic*, 66 N. J. Law, 65, 48 Atl. 609; *Lines v. Village of Otego* (Sup.) 91 N. Y. Supp. 785. But see *McCloskey v. City of Albany*, 7 Hun (N. Y.) 472. If one deals with a municipal corporation in respect to a matter beyond its corporate power, he can have no relief either at law or in equity, though in the absence of prohibition he may obtain relief, if not guilty of more than constructive wrong, so far as his money or property shall have been used by the municipality for legitimate corporate purposes. *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132.

<sup>31</sup> *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

<sup>32</sup> *City of Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Thomas v. City*

may also be brought where no fixed compensation has been agreed upon, or where no express contract of any kind has been made.<sup>83</sup> In short, the doctrines of assumpsit are applicable to municipalities as well as to natural persons, and the action may be maintained on any of the common counts, "not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial."<sup>84</sup> The following distinctions, however, have been made: "The money must have gone into her treasury, or been appropriated by her; and, when it is property other than money, it must have been used by her or been under her control. But with reference to services rendered, the case is different. Their acceptance must be evidenced by ordinance, or express corporate action to that effect. If not originally authorized, no liability can attach upon any ground of implied contract; the acceptance, upon which alone the obligation to pay could arise, would be wanting."<sup>85</sup> This discrimination in favor of property and money over labor and other services does not meet with unanimous approval by the courts,<sup>86</sup> and in Massachusetts it has been held that one who loans money to a town treasurer in a manner not authorized by statute has no right of action against the town to recover it, although the money was used in paying the debt of the town.<sup>87</sup>

of Port Huron, 27 Mich. 320; Maher v. City of Chicago, 38 Ill. 266; Allegheny City v. McClurkan, 14 Pa. 81; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824; Schipper v. City of Aurora, 121 Ind. 154, 22 N. E. 878, 6 L. R. A. 318; Marble Co. v. Harvey, 92 Tenn. 125, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71.

<sup>83</sup> Fox v. City of Richmond, 40 S. W. 251, 19 Ky. Law Rep. 326. Where a municipal corporation retains benefits under a contract which it has power to make, but which is void because irregularly executed, a recovery may be had on a quantum meruit without showing a ratification by the municipal corporation. Lincoln Land Co. v. Village of Grant, 57 Neb. 70, 77 N. W. 349.

<sup>84</sup> Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040.

<sup>85</sup> Argenti v. City of San Francisco, 16 Cal. 255.

<sup>86</sup> 1 Dill. Mun. Corp. § 464; Maher v. City of Chicago, 38 Ill. 266; Peterson v. Mayor, etc., of City of New York, 17 N. Y. 450.

<sup>87</sup> Agawam Nat. Bank v. Inhabitants of South Hadley, 128 Mass.

## ILLEGAL CONTRACTS

81. Municipal contracts, like the contracts of private corporations and individuals, are also illegal and void whenever they are contrary to law, to public policy, or to good morals.

The same causes which invalidate private contracts also destroy those made by municipal corporations. These causes need not be here enumerated. It will suffice to recall that any contract which involves matter that is malum prohibitum or malum in se is illegal. There are, however, certain grounds for impeaching municipal contracts which call for special mention because of their frequency and facility in municipal transactions.

### *Contracts with Officers*

It is a fundamental rule that aldermen and officers of a municipality must not make contracts with it.<sup>38</sup> This is a universal rule, unyielding in its application, and founded on the purest public policy.<sup>39</sup> It prohibits municipal contracts with private corporations in which members of the council may be

503. And where a mayor of a city, without authority, executed a contract on behalf of the city, the city was held not estopped to deny the same, it not having received any benefits thereunder. Indiana Road-Mach. Co. v. City of Sulphur Springs (Tex. Civ. App.) 63 S. W. 908. But where one in good faith loaned money to a town, to be used for a corporate purpose, taking its bonds therefor, he was held entitled to recover, in an action for money had and received, where the bonds were void for want of power in the town to issue them. Fernald v. Town of Gilman (C. C.) 123 Fed. 797.

<sup>38</sup> West v. Berry, 98 Ga. 402, 25 S. E. 508; Macy v. City of Duluth, 68 Minn. 452, 71 N. W. 687; McElhinney v. City of Superior, 32 Neb. 744, 49 N. W. 705; Village of Dwight v. Palmer, 74 Ill. 295; Benton v. Hamilton, 110 Ind. 294, 11 N. E. 238; Harrison v. City of Elizabeth, 70 N. J. Law, 591, 57 Atl. 132.

<sup>39</sup> City of Ft. Wayne v. Rosenthal, 75 Ind. 156, 39 Am. Rep. 127; Benton v. Hamilton, 110 Ind. 294, 11 N. E. 238; American Emigrant Co. v. Wright County, 97 U. S. 339, 24 L. Ed. 912.

interested.<sup>40</sup> Such contracts are said to be fraudulent in law, and hence illegal and void.<sup>41</sup> This has been so ruled of a contract with an attorney who was an alderman;<sup>42</sup> and of a contract made with an electric light company, a share of stock of which was pledged to an alderman;<sup>43</sup> and so also of a contract for horses and carriages, to be used in a celebration, made with a liveryman who was an alderman.<sup>44</sup>

#### *Against Public Policy*

A promise to pay a public corporation or its agents a premium for doing their duty is illegal and void.<sup>45</sup> "A contract will not be sustained which tends to restrain or control the unbiased judgment of public officers;"<sup>46</sup> and so of a promise by a city to surrender its right to lay out a street, it being contrary to public policy and void, as abdicating a public function;<sup>47</sup> also of a contract binding the city authorities not to

<sup>40</sup> *Nunemacher v. City of Louisville*, 98 Ky. 334, 32 S. W. 1091; *Hardy v. City of Gainesville*, 121 Ga. 327, 48 S. E. 921; *Drake v. City of Elizabeth*, 69 N. J. Law, 190, 54 Atl. 248; *Snipes v. City of Winston*, 126 N. C. 374, 35 S. E. 610, 78 Am. St. Rep. 666; *Santa Ana Water Co. v. Town of San Buenaventura* (C. C.) 65 Fed. 323; *Duncan v. City of Charleston*, 60 S. C. 532, 39 S. E. 265; *Finch v. Riverside & A. Ry. Co.*, 87 Cal. 597, 25 Pac. 765; *Bellaire Goblet Co. v. Findlay*, 5 Ohio Cir. Ct. R. 418; *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Milford v. Milford Water Co.*, 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122; *Foster v. City of Cape May*, 60 N. J. Law, 78, 36 Atl. 1089; *Commonwealth v. De Camp*, 177 Pa. 112, 35 Atl. 601.

<sup>41</sup> *1 Dill. Mun. Corp.* § 444; *Tied. Mun. Corp.* § 167.

<sup>42</sup> *West v. Berry*, 98 Ga. 402, 25 S. E. 508.

<sup>43</sup> *Foster v. City of Cape May*, 60 N. J. Law, 78, 36 Atl. 1089.

<sup>44</sup> *Smith v. City of Albany*, 61 N. Y. 444. The trustees of gasworks of a city are "municipal officers," within the meaning of the term relating to municipal officers making contracts with firms of which they are members. *State v. Funk*, 16 Ohio Cir. Ct. R. 155. See, also, *Marshall v. Borough of Ellwood City*, 189 Pa. 348, 41 Atl. 994; *Macy v. City of Duluth*, 68 Minn. 452, 71 N. W. 687; *Moreland v. City of Passaic*, 63 N. J. Law, 208, 42 Atl. 1058; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049.

<sup>45</sup> *City of Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396.

<sup>46</sup> *1 Dill. Mun. Corp.* § 458.

<sup>47</sup> *Martin v. Mayor, etc., of City of Brooklyn*, 1 Hill (N. Y.) 545.

exercise their legislative powers in a certain manner in the future;<sup>48</sup> and a contract to employ "none but union labor,"<sup>49</sup> or to buy only such articles as have a union label";<sup>50</sup> so of one repugnant to the result of a municipal referendum.<sup>51</sup>

#### *Contrary to Law*

A contract in violation of a statute or constitution is also illegal and void;<sup>52</sup> and so where a fire apparatus exceeding five hundred dollars in value was purchased by a city, without referring the matter to a vote of the electors as required by statute, the contract was held void;<sup>53</sup> as was likewise one which attempted to evade the statute by splitting the purchase price into parts less than five hundred dollars;<sup>54</sup> so, likewise, of contracts contrary to constitutional provisions limiting annual expenditures to annual revenues;<sup>55</sup> also to one requiring a sinking fund provision for indebtedness contracted.<sup>56</sup> And so, likewise, a municipal contract obtained by means of a combination of contractors to prevent competition is illegal and void, not only as being contrary to statute, but also against

<sup>48</sup> State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

<sup>49</sup> Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222.

<sup>50</sup> Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815; Adams v. Brenan, *supra*; Holden v. City of Alton, 179 Ill. 318, 53 N. E. 556; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Appeal of Durach, 62 Pa. 495.

<sup>51</sup> George v. Wyandotte Electric Light Co., 105 Mich. 1, 62 N. W. 985.

<sup>52</sup> Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; City of Covington v. McKenna, 99 Ky. 508, 36 S. W. 518; Noel v. City of San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263; Continental Const. Co. v. City of Altoona, 92 Fed. 822, 35 C. C. A. 27; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1, 10 Atl. 170.

<sup>53</sup> Fire Extinguisher Mfg. Co. v. City of Perry, 8 Okl. 429, 58 Pac. 635.

<sup>54</sup> Fire Extinguisher Mfg. Co. v. City of Perry, *supra*; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898.

<sup>55</sup> Bradford v. City and County of San Francisco, 112 Cal. 537, 44 Pac. 912.

<sup>56</sup> Noel v. City of San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

public policy;<sup>57</sup> and a municipal contract granting exclusive rights and franchises by a city, made otherwise than in the exercise of its police powers, is likewise illegal and void.<sup>58</sup> But the grant of a franchise for water and light plants for a term of years is not a monopoly;<sup>59</sup> nor is a contract for the exclusive right to clear and dispose of garbage of a city an illegal monopoly.<sup>60</sup>

### ANNULLING CONTRACTS

**82. A municipality has no power to arbitrarily annul its contracts, but may renounce, terminate, or rescind them only on the same terms and under the same conditions as other contracting parties.**

Municipal contracts are held to be made in the exercise of municipal rather than governmental powers.<sup>61</sup> The contracting parties, are equal before the law, both as regards the making and performance of the contract, and each has the same right and remedy as the other.<sup>62</sup> The city, therefore, possesses no power of annulling its contracts in virtue of its public character.<sup>63</sup> The analogy of the law of private corpora-

<sup>57</sup> *Brady v. Bartlett*, 56 Cal. 350.

<sup>58</sup> *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547.

<sup>59</sup> *Altgelt v. City of San Antonio*, 81 Tex. 436, 17 S. W. 75; 13 L. R. A. 383; *City of Brenham v. Water Co.*, 67 Tex. 545, 4 S. W. 143.

<sup>60</sup> *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *State v. Orr*, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279.

<sup>61</sup> *City of Greenville v. Greenville Waterworks Co.*, 125 Ala. 625, 27 South. 764; *Rae v. Flint*, 51 Mich. 526, 16 N. W. 887; *Gregory v. City of Bridgeport*, 41 Conn. 76, 19 Am. Rep. 458; *City of Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396.

<sup>62</sup> *Little Falls Electric & Water Co. v. City of Little Falls* (C. C.) 102 Fed. 663; *Parr v. Village of Greenbush*, 42 Hun (N. Y.) 232; *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671; *City of Galveston v. Loonie*, 54 Tex. 517.

<sup>63</sup> *Hudson Electric Light Co. v. Inhabitants of Hudson*, 163 Mass. 346, 40 N. E. 109; *City of Newport v. Phillips*, 40 S. W. 378, 19 Ky. Law Rep. 352; *Portland Lumbering & Mfg. Co. v. City of East Port-*

tions is generally recognized as controlling in such matters.<sup>64</sup> Where the right to annul or terminate the contract is reserved to either party because of nonperformance by the other, or any similar express condition, it may be exercised in the mode and with the effect stipulated in the contract.<sup>65</sup> Otherwise the rescinding party must rely upon recognized equitable or legal grounds for such proceeding;<sup>66</sup> and, if the city assume arbitrarily to terminate or renounce its contract, it subjects itself thereby to the usual legal consequences of a breach of contract.<sup>67</sup> But it may, like any other party, compromise or arbitrate the matters in controversy.<sup>68</sup>

land, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290; United States Waterworks Co. v. Borough of Du Bois, 176 Pa. 439, 35 Atl. 251; Wells v. Mayor, etc., of City of Atlanta, 43 Ga. 67.

<sup>64</sup> City of Newport v. Phillips, 40 S. W. 378, 19 Ky. Law Rep. 352; Portland Lumbering & Mfg. Co. v. City of East Portland, *supra*; Pullman v. Mayor, etc., of City of New York, 54 Barb. (N. Y.) 169.

<sup>65</sup> Bierry v. City of New Orleans, 24 La. Ann. 21; Farmers' Loan & Trust Co. v. Galesburg, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573.

<sup>66</sup> City of Newport v. Phillips, 40 S. W. 378, 19 Ky. Law Rep. 352. A modification of a contract by a city, or a waiver of conditions therein, found to be prejudicial to its interests, may be made by implication. City of Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483.

<sup>67</sup> Jones v. City of Richmond, 18 Grat. (Va.) 517, 98 Am. Dec. 695; City of Williamsport v. Com. ex rel. Bair, 84 Pa. 487, 24 Am. Rep. 208; City of Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557; Gregory v. City of Bridgeport, 41 Conn. 76, 19 Am. Rep. 458.

<sup>68</sup> Ford v. Clough, 8 Greenl. (Me.) 334, 23 Am. Dec. 513; Collins v. Welch, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111; Inhabitants of Town of Griswold v. Inhabitants of Town of North Stonington, 5 Conn. 367; President, etc., of Town of Petersburg v. Mappin, 14 Ill. 193, 56 Am. Dec. 501. But not in the exercise of eminent domain. City of Somerville v. Dickerman, 127 Mass. 272; McCann v. Otoe County, 9 Neb. 324, 2 N. W. 707.

### IMPAIRING OBLIGATIONS

#### 83. A municipal contract cannot be impaired by state legislation.

Legislative control over municipal powers, and even municipal existence, as we have seen,<sup>69</sup> is unlimited. It can create, direct, control, modify, and destroy the municipality; but it can pass no law impairing the obligations of a municipal contract.<sup>70</sup> Says the Supreme Court of the United States:<sup>71</sup> "Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the Legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their

<sup>69</sup> Ante, §§ 22, 23.

<sup>70</sup> *United States v. Treasurer of Muscatine County*, 1 Dill. 522, Fed. Cas. No. 16,538; *MT. PLEASANT v. BECKWITH*, 100 U. S. 514, 25 L. Ed. 699, Cooley, Cas. Mun. Corp. 74; *People ex rel. McLane v. Bond*, 10 Cal. 563; *SHAPLEIGH v. SAN ANGELO*, 167 U. S. 654, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319; *City of Memphis v. United States ex rel. Brown*, 97 U. S. 293, 24 L. Ed. 920; *Morris v. State ex rel. Gussett*, 62 Tex. 728; *Smith v. City of Appleton*, 19 Wis. 468; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

<sup>71</sup> *Wolff v. New Orleans*, *supra*. See, also, *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793.

fulfillment. However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principles which secure the inviolability of contracts." The remedy of the contractor in case of repeal of a charter and dissolution has received consideration in preceding sections.<sup>72</sup>

### MONEY CONTRACTS

**84.** The inherent or implied power of a municipal corporation to borrow money and execute negotiable paper or municipal bonds therefor is an unsettled point of municipal law in America, a majority of the cases seeming to recognize the existence of that municipal power, while the weight of the reasoning denies it except where expressly conferred.

A synopsis of the law upon this subject as applied to quasi corporations will be found in a subsequent chapter,<sup>73</sup> and the doctrines and rules therein laid down as to county bonds will be found generally applicable to municipal bonds. The distinction between the powers of municipal and quasi corporations to borrow money and execute negotiable securities therefor will be found to lie in the different nature of the two classes of corporations, the latter being exclusively public and governmental,<sup>74</sup> while the former possesses powers and rights of a quasi private nature, usually denominated "strictly municipal."<sup>75</sup> In view of these strictly municipal and quasi private rights and powers of a municipal corporation, the majority of the American courts have been inclined to recognize in municipal corporations the same inherent or implied powers to borrow money and make negotiable paper as are committed to private corporations.<sup>76</sup> Judge Dillon has made an earn-

<sup>72</sup> Ante, § 36.

<sup>74</sup> Ante, §§ 5-7; post, 165.

<sup>73</sup> Post, §§ 179, 180.

<sup>75</sup> Ante, §§ 6-7.

<sup>76</sup> *De Voss v. City of Richmond*, 18 Grat. (Va.) 338, 98 Am. Dec. 647; President, etc., of Bank of Chillicothe v. Mayor, etc., of Town

est protest against the concession of this implied or inherent power to municipal corporations,<sup>77</sup> which was based upon opinions of the Supreme Court of the United States, especially that of Mr. Justice Bradley, in the Nashville Case,<sup>78</sup> and which has received support from the Supreme Courts of several states,<sup>79</sup> and it seems likely to become the prevailing doctrine of the American courts, though it has not as yet been so expressly declared. The weight of his personal opinion as an author on municipal law is so generally recognized by lawyers and judges as to warrant the adoption here of his views as to points where the American cases are conflicting and cannot be harmonized.<sup>80</sup> Concisely stated, they are as follows:<sup>81</sup>

(1) Municipal expenses are based upon municipal revenues, and the power to borrow money as a means of making future improvements or meeting current expenses cannot be implied from the mere authority to make such improvements, nor from the usual grants of municipal power.

of Chillicothe, 7 Ohio, 31, pt. 2, 30 Am. Dec. 185; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; State v. Babcock, 22 Neb. 614, 35 N. W. 941; City of Richmond v. McGirr, 78 Ind. 192; City of Kenosha v. Lamson, 9 Wall. (U. S.) 477, 19 L. Ed. 725; Stratton v. Allen, 16 N. J. Eq. 229; Davis v. Proprietors of Second Universalist Meeting-House, 8 Metc. (Mass.) 321; City of Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. Ed. 164; City of Williamsport v. Com. ex rel. Bair, 84 Pa. 497, 24 Am. Rep. 208; Williamson County v. Farson, Leach & Co., 101 Ill. App. 328; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534; Robertson v. Breedlove, 61 Tex. 316. Contra, Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660; Village of Oquawka v. Graves, 82 Fed. 568, 27 C. C. A. 327; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141.

<sup>77</sup> 1 Dill. Mun. Corp. (5th Ed.) §§ 282-289.

<sup>78</sup> City of Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. Ed. 164.

<sup>79</sup> Swackhamer v. Town of Hackettstown, 37 N. J. Law, 191; Hewitt v. Board of Education of Normal School Dist., 94 Ill. 528; Thomas v. City of Port Huron, 27 Mich. 320.

<sup>80</sup> Uncas Nat. Bank v. Superior, 115 Wis. 340, 91 N. W. 1004; Birmingham v. German-American Bank, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; Lehman v. City of San Diego (C. C.) 73 Fed. 105; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141. See note 5, c. 1.

<sup>81</sup> 1 Dill. Mun. Corp. (5th Ed.) § 289.

(2) The nature of the usual functions of a municipality is so widely different from that of a private corporation as not to warrant the use of analogy to determine the inherent powers of the municipality as to borrowing money and issuing commercial paper.

(3) The power to issue negotiable paper, unimpeachable in the hands of the holder, is not an inherent or implied power of a municipal corporation.

(4) Power to issue negotiable paper may be properly, but not necessarily, inferred from the express power to borrow money granted to a municipality.

(5) Municipal paper negotiable in form, if issued by a public corporation required to audit all claims and issue to the creditor warrants or orders therefor, is subject to all legal and equitable defenses in the hands of a transferee, as of the original holder. And the same rule prevails where the municipality may make and create debts and issue evidences of liability thus incurred, unless it has express or clearly implied power to issue negotiable paper.

## CHAPTER IX

### IMPROVEMENTS

85. Municipal Improvements in General.
86. General and Local Improvements Distinguished.
87. Power to Make or Aid.
88. Preliminary Proceedings.
89. Contracts.
90. Damages.
91. Special Assessments.
92. Enforcing Collection.

#### MUNICIPAL IMPROVEMENTS IN GENERAL

85. Municipal improvements include all those additions to or changes in the municipal property, made by the use of money and labor or skill, for the purpose and with the effect of enhancing taxable values or ameliorating conditions of life in the municipality.

The chief object of citizens in effecting municipal organization is the amelioration of urban conditions. Physical change follows close upon the preservation of social order. An urban population requires special provisions for its comfort and well-being not necessary in rural districts. They are such as will preserve health, facilitate locomotion, and generally promote the convenience of the citizens. Each proprietor may care for his own property in his own way, but for the public comfort and the general convenience of the inhabitants provision must be made in accordance with plans which usually approximate urban ideals. To accomplish these purposes, improvements are necessary. Streets must be laid out, graded, curbed, guttered, paved, and lighted; sidewalks must be laid; municipal buildings must be erected; water must be furnished; sewers constructed; and electric plants are coming into municipal use to furnish not only light, but power, for municipal purposes. Parks, also, are urban necessities, and

boulevards contribute greatly not only to the beauty, but the health, of a city. And, since many cities are situate upon navigable waters, docks and wharves are necessities for their trade and commerce. Nor are public schoolhouses, halls, hospitals, and auditoriums to be omitted. The construction and care of all these things properly pertain to a modern municipality, and they are embraced within the comprehensive term "improvements," whether they are general in their nature, for the common use of all the citizens, or, by reason of being local, afford special benefits and advantages to citizens owning property or living in a particular locality.<sup>1</sup>

Repairs or slight improvements made within the limits of the ordinary revenues of the city are not usually considered to be included within the meaning of the term "improvements."<sup>2</sup> The word is usually employed to describe such material or thorough changes in physical conditions as involve extraordinary expenditure or unusual taxation.<sup>3</sup>

### GENERAL AND LOCAL IMPROVEMENTS DISTINGUISHED

86. Municipal improvements are necessarily public; but they may be general in their character, as bettering the entire municipality, or local, as conferring special benefits upon a certain street, block, or sec-

<sup>1</sup> 2 Beach, Pub. Corp. § 1170; Elliott, Mun. Corp. § 115; 4 McQuillin Mun. Corp. § 1816. See, also, Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936; Riverside & A. Ry. Co. v. City of Riverside (C. C.) 118 Fed. 736; Taylor v. Patton, 160 Ind. 4, 66 N. E. 91; Scott v. La Porte, 162 Ind. 34, 68 N. E. 278. A city has implied power to light its streets and public buildings and places, and may do so by the erection of plants. Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825.

<sup>2</sup> Philadelphia v. Dibeler, 147 Pa. 261, 23 Atl. 567; In re Fulton St., Brooklyn, 29 How. Prac. (N. Y.) 429; Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. 342; Cronin v. Mayor, etc., of Jersey City, 38 N. J. Law, 410.

<sup>3</sup> Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. 342.

tion. The former are generally paid for out of the municipal treasury; the latter by local taxation.

The power of the municipality to make improvements cannot be exercised for the benefit of private individuals, firms, or corporations, but must be confined to such enterprises as are affected by a public interest.<sup>4</sup> But so long as the improvement is in the public interest it may be either general, as benefiting the municipality at large in an equal degree, or it may be local, in that it confers some special benefit on a particular section of the city.<sup>5</sup> Improvements of the former class are generally paid for out of the municipal treasury, while the expense of those of the latter class must be defrayed by local and special taxation.<sup>6</sup>

It is not as a rule difficult to determine whether an improvement is general or local, if due consideration is given to the nature and purpose of the improvement. The nature alone is often the determining factor, but not always, as the ordinance may by a distinct declaration of purpose change what would otherwise be a local improvement, and consequently to be paid for by special taxation, into a general one, the expense of which is to be borne by the public treasury.<sup>7</sup> Generally speaking, the erection of a public building, such as a courthouse, city hall, schoolhouse, or public market, is classed as a general im-

<sup>4</sup> *Low v. Mayor, etc., of City of Maysville*, 5 Cal. 214; *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; *Dyar v. Farmington Village Corp.*, 70 Me. 515. The validity of the vacation of a street is, however, not affected by the fact that it was for the benefit of a private individual or corporation. *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. 651; *City of Marshalltown v. Forney*, 61 Iowa, 578, 16 N. W. 740.

<sup>5</sup> *Rogers v. City of St. Paul*, 22 Minn. 494; *Mayor, etc., of City of Baltimore v. Hanson*, 61 Md. 462; *Loeffler v. City of Chicago*, 246 Ill. 43, 92 N. E. 586, 20 Ann. Cas. 335.

<sup>6</sup> *Loeffler v. City of Chicago*, 246 Ill. 43, 92 N. E. 586, 20 Ann. Cas. 335; *Enos v. City of Springfield*, 113 Ill. 65; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304; *In re Sawmill Run Bridge*, 85 Pa. 163.

<sup>7</sup> *Mayor, etc., of City of Baltimore v. Hanson*, 61 Md. 462.

provement.<sup>8</sup> So, too, is the erection of a municipal water plant, or electric light plant, the laying of trunk water mains, or the building of trunk sewers, or the creation of a public park.<sup>9</sup> On the other hand, the opening, grading, and paving streets, curbing and guttering, laying sidewalks, the construction of lateral, local, or district sewers, and the laying of lateral water mains, are almost always regarded as local improvements, the expense of which is to be assessed on the property benefited.<sup>10</sup>

There are, however, exceptions to these general rules, arising from the special circumstances surrounding the improvement. Thus it has been held that, if the ordinance providing for opening or improving a street declares in terms that the improvement is for the general public benefit or convenience, it will be presumed to have been made without reference to local benefits, and the cost should be borne by the general treasury, though, had the ordinance been silent on that point, local as well as general benefits would be presumed, so as to render valid assessments on the abutting property.<sup>11</sup> Conversely, it has been held that, though a public park is a general benefit to the whole city, yet it is usually a special benefit to the particular locality where it is situated, and consequently, to the extent to which the locality is specially benefited, the cost may be assessed on the property thus benefited.<sup>12</sup>

<sup>8</sup> City of Ft. Wayne v. Shoaff, 106 Ind. 66, 5 N. E. 403.

<sup>9</sup> Village of Morgan Park v. Wiswall, 155 Ill. 262, 40 N. E. 611; Hewes v. Glos, 170 Ill. 436, 48 N. E. 922; State ex rel. Chouteau v. Leffingwell, 54 Mo. 458; Heman v. Handlan, 59 Mo. App. 490. And see Sears v. Street Com'rs of Boston, 173 Mass. 350, 53 N. E. 876.

<sup>10</sup> PALMER v. CITY OF DANVILLE, 154 Ill. 156, 38 N. E. 1067, Cooley, Cas. Mun. Corp. 202, 225; Smith v. City of Seattle, 25 Wash. 300, 65 Pac. 612; Gray v. Town of Cicero, 177 Ill. 459, 53 N. E. 91; Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602; Enos v. City of Springfield, 113 Ill. 65; Rogers v. City of St. Paul, 22 Minn. 494; PAYNE v. VILLAGE OF SOUTH SPRINGFIELD, 161 Ill. 285, 44 N. E. 105, Cooley, Cas. Mun. Corp. 203.

<sup>11</sup> Mayor, etc., of City of Baltimore v. Hanson, 61 Md. 462. The approach to a bridge crossing railway tracks is a general and not a local improvement. State v. Smith, 99 Minn. 59, 108 N. W. 822.

<sup>12</sup> State ex rel. City of St. Paul v. District Court of Ramsey Coun-

**POWER TO MAKE OR AID**

87. The power to make general improvements is inherent in every municipality; but the power to make local improvements at the expense of the locality must be conferred expressly by the charter or by statute, or plainly implied.

The general amelioration of urban conditions is the paramount object of municipal incorporation. To devise and execute plans to attain this object is an essential function of the municipality. For the performance of this municipal function the city obviously possesses the requisite inherent power.<sup>13</sup> It is not necessary, therefore, that the power to make any of these necessary municipal improvements for the general welfare shall be expressly conferred by charter; the city has it—must have it—to protect and promote the health, happiness, and well-being of its citizens.<sup>14</sup> For instance, a city not only may but must take proper care of its

ty, 75 Minn. 292, 77 N. W. 968; Hart v. City of Omaha, 74 Neb. 836, 105 N. W. 546; Wilson v. Lambert, 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599.

<sup>13</sup> Authority given to a city to provide for the extension or construction of sewers carries with it implied power to make a general contract therefor. Jones v. Holzapfel, 11 Okl. 405, 68 Pac. 511; Elliott, Mun. Corp. § 76; Smith v. Stephan, 66 Md. 381, 7 Atl. 561; City of Galveston v. Loonie, 54 Tex. 517; Wells v. Mayor, etc., of City of Atlanta, 43 Ga. 67.

<sup>14</sup> Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; Cooley, Const. Lim. (6th Ed.) 231; Village of Carthage v. Frederick, 122 N. Y. 271, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490; Ould v. City of Richmond, 23 Grat. (Va.) 464, 14 Am. Rep. 139. But no express authority is necessary to be given to a city, it having implied authority, to require lot owners to lay sidewalks in front of their property, such improvement being considered a convenience pertinent to the lot, valuable as well to the lot as to the general public; and when a lot owner fails to make such improvement, when notified to do so, the city may do the work, or have it done, and collect the cost thereof from the property owner. City of Pittsburgh v. Daly, 5 Pa. Super. Ct. 528.

streets and alleys;<sup>16</sup> and this it may do, at an expense within the limit of its annual revenues appropriated to that purpose, without express authority.<sup>16</sup> It may also, without express grant of power therefor, construct sewers,<sup>17</sup> provide for lighting the city by gas or electricity,<sup>18</sup> or provide for the furnishing of an adequate water supply.<sup>19</sup>

But to exercise these powers, to perform these functions, in an extraordinary way, or to incur extraordinary expenses therefor, express authority is generally required;<sup>20</sup> and if an

<sup>15</sup> Pumphrey v. Mayor, etc., of Baltimore, 47 Md. 145, 28 Am. Rep. 446; Webster v. City of Chicago, 83 Ill. 458; Borough of Uniontown v. Commonwealth ex rel. Veech, 34 Pa. 293; Trustees of Town of Catlettsburg v. Kinner, 76 Ky. (13 Bush) 334. But see Parrott v. City of Bridgeport, 44 Conn. 180, 26 Am. Rep. 439. Compare Horton v. Mayor, etc., of City of Nashville, 72 Tenn. (4 Lea) 39, 40 Am. Rep. 1; City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253.

<sup>16</sup> City of Williamsport v. Commonwealth ex rel. Bair, 84 Pa. 487, 24 Am. Rep. 208; White v. Borough of McKeesport, 101 Pa. 394; In re Opening First St., 66 Mich. 42, 33 N. W. 15; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314. In City of Detroit v. Detroit United Ry., 133 Mich. 608, 95 N. W. 736, it was held that a city had authority to bind itself on contract and maintain at its own expense the foundation required in its streets for the support of street car tracks.

<sup>17</sup> City of Ft. Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82. But see Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493, 43 Atl. 104.

<sup>18</sup> City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; CITY OF CRAWFORDSVILLE v. BRADEN, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214, Cooley, Cas. Mun. Corp. 100; Gregory v. City of Bridgeport, 41 Conn. 76, 19 Am. Rep. 458; Pullman v. Mayor, etc., of City of New York, 54 Barb. (N. Y.) 169; City of Detroit v. Circuit Judge of Wayne County, 79 Mich. 384, 44 N. W. 622; Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885; Fawcett v. Town of Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, affirming (C. C.) 37 Fed. 832.

<sup>19</sup> Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885; Dyer v. City of Newport, 123 Ky. 203, 94 S. W. 25; Mayor, etc., of City of Rome v. Cabot, 28 Ga. 50.

<sup>20</sup> Town of Drummer v. Cox, 165 Ill. 648, 46 N. E. 716; Hill v. Memphis, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887; MERRILL

extensive scheme of grading and paving at great expense is to be entered upon, requiring more than the annual revenues, and thereby incurring large municipal indebtedness, or if, at large expense and by municipal loan, the city wishes to construct its own gas or electric plant, it must have express legislative authority therefor.<sup>21</sup>

#### *Local Improvements*

Local improvements are special improvements in a particular locality, and for the special benefit thereof, and as such are chargeable to the property holders of the locality.<sup>22</sup> Such improvements are not made in the exercise of the usual municipal functions, nor paid for out of the general municipal exchequer. They require an extraordinary exercise of municipal power, and lay unusual and exceptional burdens upon the property of the locality, and thus apparently violate the rule of equal taxation. For example, a certain street or avenue is converted into a boulevard, and the expense thereof charged to the abutting property owners. This is not an inherent power of a municipal corporation; the performance of such an extraordinary function requires express authority.<sup>23</sup>

v. MONTICELLO, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069, Cooley, Cas. Mun. Corp. 309; Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. Ed. 164; Sturtevants v. Alton, 3 McLean, 393, Fed. Cas. No. 13,580.

<sup>21</sup> Scott v. City of Davenport, 34 Iowa, 208; Hewitt v. Board of Education of Normal School Dist., 94 Ill. 528; Hill v. Memphis, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887; Findley v. Hull, 13 Wash. 236, 43 Pac. 28; Elliott, Mun. Corp. § 113. A contract for a street improvement, made before the adoption of a sufficient ordinance therefor, is invalid. Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853.

<sup>22</sup> Cooley, Tax'n, p. 606; Burrough, Tax'n, p. 460.

<sup>23</sup> Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Lott v. Ross, 38 Ala. 156; Winston v. Taylor, 99 N. C. 210, 6 S. E. 114; Mayor, etc., of City of Savannah v. Hartridge, 8 Ga. 23; Green v. Ward, 82 Va. 324. An ordinance is the very foundation of the improvement, when it is to be paid for by a special tax, and no special tax can be levied for improvements already made. City of Alton v. Job, 103 Ill. App. 378.

*The Power a Continuing One*

The power possessed by a municipality to make improvements, whether implied from other powers or expressly granted, is, in the absence of some special restraint imposed by the charter or by statute, a continuing power, and is not exhausted by one improvement.<sup>24</sup> The fact that a city has once graded or paved its streets does not prevent regrading or repaving, should necessity therefor arise.<sup>25</sup>

*Delegation of Power*

The powers conferred on municipal corporations to make improvements are held in trust for the public and cannot be relinquished without legislative authority.<sup>26</sup> Those powers must be exercised in strict conformity with the law conferring them.<sup>27</sup>

The city council cannot, therefore, delegate to any subordinate committee, board, or officer this power, or any portion thereof which involves the exercise of judgment or discretion.<sup>28</sup> The council may, however, delegate the performance

<sup>24</sup> Coburn v. Bossert, 13 Ind. App. 359, 40 N. E. 281; City of Kokomo v. Mahan, 100 Ind. 242; Estes v. Owen, 90 Mo. 113, 2 S. W. 133; Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118; State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183; City of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. 354; Silva v. City of Newport (Ky.) 104 S. W. 314; South Park Com'rs v. Illinois Trust & Savings Bank, 245 Ill. 382, 92 N. E. 267; Shannon v. City of Omaha, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592.

<sup>25</sup> State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183; City of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. 354.

<sup>26</sup> Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89.

<sup>27</sup> Whyte v. Mayor, etc., of Town of Nashville, 32 Tenn. (2 Swan) 364.

<sup>28</sup> Whitworth v. Webb City, 204 Mo. 579, 103 S. W. 86; Baker City Mut. Irr. Co. v. Baker City, 58 Or. 306, 113 Pac. 9; Lisbon Ave. Land Co. v. Town of Lake, 134 Wis. 470, 113 N. W. 1099; Morey v. City of Buffalo, 59 Misc. Rep. 603, 111 N. Y. Supp. 463; Egbert v. Lake Shore & M. S. Ry. Co., 6 Ind. App. 350, 33 N. E. 659; Collins v. City of Holyoke, 146 Mass. 298, 15 N. E. 908; Chilson v. Wilson, 38 Mich. 267; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Ruggles v. Collier, 43 Mo. 353; Thomas v. Mayor, etc., of City of Boon-

of purely ministerial duties connected with the making of the improvement.<sup>29</sup> So, too, a provision that the work is to be done under the direction of the city engineer or other designated person is not a delegation of power.<sup>30</sup>

Neither is it objectionable that the petition requesting a certain improvement is referred to a committee of the council to view the premises, hear the persons interested, and report to the council on the expediency of the proposed improvement, for the final consideration and determination of the council.<sup>31</sup>

ville, 61 Mo. 282; Bodine v. Common Council of City of Trenton, 36 N. J. Law, 198; Phelps v. Mayor, etc., of New York, 112 N. Y. 216, 19 N. E. 408, 2 L. R. A. 626; McCowell v. City of Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653; Minneapolis Gas Light Co. v. City of Minneapolis, 36 Minn. 159, 30 N. W. 450; Chase v. City Treasurer of City of Los Angeles, 122 Cal. 540, 55 Pac. 414; People ex rel. McCormack v. McWethy, 177 Ill. 334, 52 N. E. 479; Hall v. City of Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455; Martindale v. Town of Rochester, 171 Ind. 250, 86 N. E. 321; Arnold v. Mayor of Pawtucket, 21 R. I. 15, 41 Atl. 576.

<sup>29</sup> Mayor, etc., of City of Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Reuting v. City of Titusville, 175 Pa. 512, 34 Atl. 916; Martindale v. Town of Rochester, 171 Ind. 250, 86 N. E. 321; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964.

<sup>30</sup> Whitworth v. Webb City, 204 Mo. 579, 103 S. W. 86; Gilsonite Const. Co. v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 S. W. 93; Ferguson v. Cable, 84 Kan. 576, 114 Pac. 852; Northwestern University v. Village of Wilmette, 230 Ill. 80, 82 N. E. 615; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255; Taber v. City of New Bedford, 135 Mass. 162; Bradford v. City of Pontiac, 165 Ill. 612, 46 N. E. 794. The appointment of commissioners to make an assessment of damages and benefits is not a delegation of power, where their acts are not binding or effective until approved and confirmed by the city council. Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771. See, also, Dorman v. City Council of Lewiston, 81 Me. 411, 17 Atl. 316.

<sup>31</sup> Dorman v. City Council of Lewiston, 81 Me. 411, 17 Atl. 316.

## PRELIMINARY PROCEEDINGS

88. It is essential to the validity of any scheme of improvement that all the substantial requirements of the charter or statute authorizing the same shall be strictly observed and complied with.

The authority of a municipality to make improvements, and thus impose burdens on the taxpayers, is rarely an absolute power, but is often, and indeed generally, conditioned upon the assent of those to be burdehed by the proposed improvement. If the proposed improvement is general in its nature, the assent is required to be manifested by a popular election, general or special, showing the favor of a majority or a certain per cent. of the entire vote cast, or of all entitled to vote at such election.<sup>32</sup>

If it is a local improvement, the condition precedent may be the filing of a petition for the improvement, generally required to be signed by a majority of all freeholders to be affected thereby.<sup>33</sup> It is generally necessary that a notice shall

<sup>32</sup> Marion Water Co. v. Marion, 121 Iowa, 306, 96 N. W. 883; Thomson-Houston Electric Co. v. City of Newton (C. C.) 42 Fed. 723; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468; Gillen v. Borough of Spring Lake, 61 N. J. Law, 392, 39 Atl. 684; City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. Supp. 357, affirmed 187 N. Y. 542, 80 N. E. 1106.

<sup>33</sup> Jex v. Mayor, etc., of City of New York, 103 N. Y. 536, 9 N. E. 39; Bradley v. Village of West Duluth, 45 Minn. 4, 47 N. W. 166; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526; Steinmuller v. City of Kansas City, 3 Kan. App. 45, 44 Pac. 600; Case v. Johnson, 91 Ind. 477; People v. City of Rochester, 21 Barb. (N. Y.) 656; Mulligan v. Smith, 59 Cal. 206; Jones v. South Omaha, 3 Neb. (Unof.) 551, 94 N. W. 957. But compare Wolfe v. City of Moorehead, 98 Minn. 113, 107 N. W. 728; Dennison v. Kansas City, 95 Mo. 416, 8 S. W. 429. In Orr v. Omaha, 2 Neb. (Unof.) 771, 90 N. W. 301, it was held that where the act incorporating metropolitan cities authorized any such city to pave any street or alley within its limits, either with or without a petition of the property owners representing

be duly published or posted, warning those interested of the nature and extent of the proposed improvement, and inviting them to show cause before the common council, either orally or in writing, why it should not be made.<sup>34</sup>

This notice may take the form of a preliminary resolution declaring the necessity for the proposed improvement.<sup>35</sup> A public hearing, at which those affected by the proposed improvement may be heard and remonstrances considered, may be required.<sup>36</sup>

These preliminary requirements vary in the different states, being determined wholly by the local statutes. But, whatever

a majority of the feet frontage, the city had no authority to make the cost of paving a charge against the abutting property without a petition of the owners of such property. But in the same case it was held that the city could, under the same provision, when it had ordered a street paved, curb and gutter the same, and make the expense thereof a legal charge upon the abutting real estate, though there was no petition for such improvement. See *New Iberia v. Fontelieu*, 108 La. 460, 32 South. 369; *Taylor v. Patton*, 160 Ind. 4, 66 N. E. 91; *Board of Improvement Dist. No. 60 v. Cotter*, 71 Ark. 556, 76 S. W. 552. And under a statute authorizing street paving to be done "when the person owning real estate which has at least one-third fronting on the street, the improvement of which is desired, shall request the commissioners to make such improvement," the city cannot, as an owner of property fronting on such street, join in signing such request, in order to make the same come up to the legal requirement. *City of Atlanta v. Smith*, 99 Ga. 462, 27 S. E. 696.

<sup>34</sup> *Sears v. Atlantic City*, 72 N. J. Law, 435, 60 Atl. 1093, affirmed 73 N. J. Law, 710, 64 Atl. 1062, 118 Am. St. Rep. 724; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175; *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774; *Peck v. Bridgeport*, 75 Conn. 417, 53 Atl. 893; *GRAY v. BURR*, 138 Cal. 109, 70 Pac. 1068; *Cooley, Cas. Mun. Corp. 214; Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150; *Adams v. Roanoke*, 102 Va. 53, 45 S. E. 881. Compare *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142.

<sup>35</sup> *City of Nevada, to Use of Gilfillan, v. Eddy*, 123 Mo. 546, 27 S. W. 471; *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243.

<sup>36</sup> *Wasburn v. City of Chicago*, 198 Ill. 506, 64 N. E. 1064; *GRAY v. BURR*, 138 Cal. 109, 70 Pac. 1068, *Cooley, Cas. Mun. Corp. 214*. But see *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730.

preliminary steps must be taken, it is the almost, if not wholly, universal rule that the final determination of the council to make the improvement must be embodied in an ordinance or resolution ordering the improvement, containing a description thereof and provisions for defraying the expense of doing the work.<sup>37</sup>

The obvious purpose of all these requirements is to gain the assent of those interested. Some of them absolutely prevent taxation without popular consent, others without consent of those to be taxed, and others, in analogy to judicial proceeding, recognize the right of the parties interested to be heard in their own behalf. To some degree the right of home rule is recognized in all of them. In harmony with the legislative intention are the decisions of the courts to the effect that these statutory provisions are conditions precedent to the exercise of the taxing power delegated to the municipality for purposes of improvement, and that the omission or failure to observe and comply with them renders invalid any effort of the municipality to make the improvement. These provisions are held to be mandatory, and compliance with them is absolutely essential to the exercise of the power.<sup>38</sup>

#### *Strict Construction*

The rule of strict construction is also applied to statutes giving this power of special or extraordinary taxation,<sup>39</sup> and it has been accordingly held that a guardian of children can-

<sup>37</sup> City of Carlyle v. County of Clinton, 140 Ill. 512, 30 N. E. 782; Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455, 25 N. E. 436; Ware v. Borough of Rutherford, 55 N. J. Law, 450, 26 Atl. 933; City of Sterling v. Galt, 117 Ill. 11, 7 N. E. 471; Hughes v. City of Muncie, 163 Ill. 535, 45 N. E. 300; Zalesky v. City of Cedar Rapids, 118 Iowa, 714, 92 N. W. 657.

<sup>38</sup> People v. Smith, 201 Ill. 454, 66 N. E. 298; Morse v. Omaha, 67 Neb. 426, 93 N. W. 734; Blanchard v. Bissell, 11 Ohio St. 96; Missouri Pac. Ry. Co. v. City of Wyandotte, 44 Kan. 32, 23 Pac. 950; White v. City of Saginaw, 67 Mich. 33, 34 N. W. 255; McLaren v. City of Grand Forks, 6 Dak. 397, 43 N. W. 710.

<sup>39</sup> Merritt v. Village of Portchester, 71 N. Y. 309, 27 Am. Rep. 477; Hoyt v. City of East Saginaw, 19 Mich. 39, 2 Am. Rep. 76.

not be counted to make a majority of property holders signing a petition;<sup>40</sup> nor one of two joint tenants;<sup>41</sup> nor a life tenant.<sup>42</sup> It has also been held that the names of property holders upon an original petition to the council, which had been laid upon the table, cannot be added to those subscribed to a subsequent petition for the same improvement in order to make a majority.<sup>43</sup> Also, where the initiative is by the municipality, and notice is required, it must be given in writing;<sup>44</sup> and where publication is permitted the improvement must be specifically described;<sup>45</sup> and want of notice or insufficient notice invalidates the ordinance for the improvement.<sup>46</sup>

#### *Discretion of Council*

Where the council is vested with power to order and make the improvement, either upon petition or notice, and these formal requirements have been complied with, the power of the council is discretionary and quasi judicial,<sup>47</sup> and its decision

<sup>40</sup> Auditor General v. Fisher, 84 Mich. 128, 47 N. W. 574.

<sup>41</sup> Auditor General v. Fisher, *supra*. But where the decision for the improvement is based upon the petition of the owners of a certain percentage in value of the property to be affected, and one of two partners signs the petition for such improvement, and the other does not, one-half of the value of the partnership property should be added in finding the total value of the property of the petitioners. *Earl v. Board of Improvement of City of Morrilton*, 70 Ark. 211, 67 S. W. 312.

<sup>42</sup> *Mayor, etc., of City of Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028; *Ahern v. Board of Improvement Dist. No. 3*, 69 Ark. 68, 61 S. W. 575. Compare *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509.

<sup>43</sup> Auditor General v. Fisher, *supra*.

<sup>44</sup> *City of Cincinnati v. Sherike*, 47 Ohio St. 217, 25 N. E. 169. If the statute provides for publication of the notice, personal service thereof is not sufficient. *Zalesky v. City of Cedar Rapids*, 118 Iowa, 714, 92 N. W. 657.

<sup>45</sup> *Jenney v. City of Des Moines*, 103 Iowa, 347, 72 N. W. 550; *Polk v. McCartney*, 104 Iowa, 567, 73 N. W. 1067; *Mason v. City of Sioux Falls*, 2 S. D. 640, 51 N. W. 770, 39 Am. St. Rep. 802.

<sup>46</sup> *State v. Town of West Hoboken*, 53 N. J. Law, 64, 20 Atl. 737.

<sup>47</sup> *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342; *Fuller v. City of Atlanta*, 66 Ga. 80; *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531; *Connor v. City of Marshfield*, 128 Wis. 280, 107 N. W. 639.

is conclusive, in the absence of mistake or fraud.<sup>48</sup> The discretion exercised by the city council in regard to the expediency and method of making improvements is not the subject of judicial review, except when an abuse of such discretion clearly appears;<sup>49</sup> and the courts will not interfere to prevent

<sup>48</sup> *Wiggin v. Mayor, etc., of New York*, 9 Paige (N. Y.) 16; *Alberger v. Mayor, etc., of City of Baltimore*, 64 Md. 1, 20 Atl. 988; *City of Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165; *Collins v. City of Keokuk*, 147 Iowa, 233, 124 N. W. 601; *State v. District Court of Ramsey County*, 33 Minn. 164, 22 N. W. 295; *Id.*, 33 Minn. 295, 23 N. W. 222; *City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366; *Appeal of Houghton*, 42 Cal. 35; *City of Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532; *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 916, 922; *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624; *Oakley v. City of Atlantic City*, 63 N. J. Law, 127, 44 Atl. 651.

<sup>49</sup> *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Brown v. City of Saginaw*, 107 Mich. 643, 65 N. W. 601; *City of Kansas City v. Trotter*, 9 Kan. App. 222, 59 Pac. 679.

*Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711; *Gardner v. City of Chicago*, 224 Ill. 254, 79 N. E. 624; *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667; *City of Emporia v. Gilchrist*, 37 Kan. 532, 15 Pac. 532; *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962; *Alberger v. Mayor, etc., of City of Baltimore*, 64 Md. 1, 20 Atl. 988. But where the determination has been arrived at without the exercise of discretion, the action of the council may be the subject of judicial review. See *DIAMOND v. MANKATO*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448, Cooley, Cas. Mun. Corp. 183; where a city council, by ordering the construction of a new sidewalk at the expense of the abutting property owners, determined that such sidewalk was necessary, and that the abutting property was benefited thereby to the extent of a special tax. It was held that such determination, unless arbitrary and unreasonable, was conclusive of the question of the necessity of the improvement, and of the benefit to be derived therefrom. See, also, *Pierson v. People ex rel.*, 204 Ill. 456, 68 N. E. 383; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410; *Burckhardt v. City of Atlanta*, 103 Ga. 302, 30 S. E. 32; *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164; *McChesney v. City of Chicago*, 171 Ill. 253, 49 N. E. 548; *Allen v. Woods (Ky.)* 45 S. W. 106, 41 L. R. A. 351.

Where a city charter provides that paving of its streets may be initiated upon the petition of a majority of the lot owners, but that the city council may make the improvement without any petition when public necessity requires it, the power to determine whether

the improvement merely because of alleged inutility or prodigality.<sup>50</sup> So where the council is authorized, either expressly or by fair implication, to determine whether a majority of property owners have requested the improvement, their action in ordering the improvement thereon is a conclusive determination of that question.<sup>51</sup> But where this jurisdiction is not conferred upon the council, then the courts may inquire and determine whether the majority have so petitioned.<sup>52</sup> In general, it may be said that all those provisions of the statute which look to the protection of substantial rights of the property owner, or to the intelligent exercise of discretion committed to the common council, are material requirements; and unless they are complied with, the ordinance for the improvement is void.<sup>53</sup> But it has often been held that the validity of the ordinance is not affected by the absence of less

public necessity requires the making of such improvement without a petition is in the discretion of the council, whose decision is final, unless arbitrary or fraudulent. *DIAMOND v. MANKATO*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448, Cooley, Cas. Mun. Corp. 183; *Akers v. Kolkmeyer*, 97 Mo. App. 520, 71 S. W. 536. Whether the motives of a town council in vacating a street are proper cannot be judicially inquired into, but the end accomplished might be considered in passing on its validity. *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

<sup>50</sup> *People ex rel. Nichols v. Board of Supervisors of Queens County*, 62 Hun, 619, 16 N. Y. Supp. 705. The courts have no power to interfere to prevent the construction of a local improvement upon the ground that it is not necessary, and that its construction is an unreasonable burden upon the property sought to be assessed, unless the discretion vested in the city council has been abused to such an extent as to render the ordinance providing for the improvement so unreasonable that it may be declared void. *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

<sup>51</sup> *Spaulding v. North San Francisco Homestead & R. Ass'n*, 87 Cal. 40, 25 Pac. 249.

<sup>52</sup> *Kahn v. Supervisors of San Francisco*, 79 Cal. 388, 21 Pac. 849; *Id.*, 86 Cal. xxi, 25 Pac. 403.

<sup>53</sup> *Hoyt v. City of East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Hewes v. Reis*, 40 Cal. 255; *City of Terre Haute v. Lake*, 43 Ind. 480; *Gates v. Hancock*, 45 N. H. 528; *Sullivan v. City of Leadville*, 11 Colo. 483, 18 Pac. 736; *Hudson v. Mayor, etc., of City of Marietta*, 64 Ga. 286.

important elements, such as particular specification of the work to be done, the materials to be used,<sup>54</sup> the width of the street,<sup>55</sup> or the proportion of the entire expense to be borne by the locality.<sup>56</sup>

## CONTRACTS

89. A municipal contract for public improvements is subject to the following limitations and conditions:

- (1) It must be let and made in the prescribed method.
- (2) The subject-matter of the contract must have been included within the ordinance or resolution ordering the improvement.
- (3) The contract must not surrender or abdicate any public function or duty.

Assuming that the statutory requirements and conditions precedent to the making of a public improvement have been complied with before the passage of the ordinance or resolu-

<sup>54</sup> Becker v. City of Washington, 94 Mo. 375, 7 S. W. 291; City of Springfield v. Mathus, 124 Ill. 88, 16 N. E. 92; Parish v. Golden, 35 N. Y. 464; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788; Wetmore v. Chicago, 206 Ill. 367, 69 N. E. 234. As to what constitutes a defect for uncertainty, see McDowell v. People ex rel., 204 Ill. 499, 68 N. E. 379. Where there were mere inaccuracies in the description of the proposed improvement: People ex rel. v. Burke, 206 Ill. 358, 69 N. E. 45; McChesney v. Chicago, 205 Ill. 611, 69 N. E. 82. But any substantial and material departure from the specification in a contract of a city which is required by law to be let to the lowest bidder will render the contract void, notwithstanding but one bid was presented for the work. Le Tourneau v. Hugo, 90 Minn. 420, 97 N. W. 115. See Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290; City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

<sup>55</sup> Bacon v. City of Savannah, 86 Ga. 301, 12 S. E. 580; Woods v. City of Chicago, 135 Ill. 582, 26 N. E. 608; Burghard v. Fitch, 24 Ky. Law Rep. 1983, 72 S. W. 778; Gage v. City of Chicago, 196 Ill. 512, 63 N. E. 1031; Smythe v. City of Chicago, 197 Ill. 311, 64 N. E. 361. Nor is the ordinance void for failing to specify the time within which the work shall be completed. Allen v. La Force, 95 Mo. App. 324, 68 S. W. 1057; Pierson v. People ex rel., 204 Ill. 456, 68 N. E. 383.

<sup>56</sup> Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723.

tion that the improvement shall be made by the city, it is important next to inquire whether the contract formulated in pursuance thereof is within the scope and purview of the ordinance. At every step in the transaction there is a challenge of authority which the contractor must heed at his peril:<sup>57</sup> (a) Has the Legislature under the Constitution power to grant authority to the municipality? (b) Has the Legislature duly conferred such power upon the municipality? (c) Has the governing board of the municipality, in pursuance of such authority, ordained that the improvement shall be made? (d) Is the proposed contract within the scope of the ordinance? (e) Is the person assuming to represent the city in making the contract an authorized agent thereof? If an affirmative answer can be given to all these questions, the contractor may feel secure in proceeding under his municipal contract.

#### *Mode of Contracting*

As shown in the last chapter,<sup>58</sup> municipal contracts must be let and made in the manner prescribed by law, of which all

<sup>57</sup> Citizens' Bank of Des Moines v. City of Spencer, 126 Iowa, 101, 101 N. W. 643; Case v. Johnson, 91 Ind. 477; City of Lancaster v. Miller, 58 Ohio St. 558, 51 N. E. 52; Jones v. Town of Lind, 79 Wis. 64, 48 N. W. 247; Fletcher v. City of Oshkosh, 18 Wis. 229; Drummond v. City of Eau Claire, 79 Wis. 97, 48 N. W. 244; CHIPPEWA BRIDGE CO. v. CITY OF DURAND, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; Cooley Cas. Mun. Corp. 175; Flewellin v. Proetzel, 80 Tex. 191, 15 S. W. 1043; Ziegler v. Chapin, 59 Hun, 214, 13 N. Y. Supp. 783; Id., 126 N. Y. 342, 27 N. E. 471; Dey v. Mayor, etc., of Jersey City, 19 N. J. Eq. 412; Lyon v. Alley, 130 U. S. 177, 9 Sup. Ct. 480, 32 L. Ed. 899; Mathewson v. City of Grand Rapids, 88 Mich. 558, 50 N. W. 651, 26 Am. St. Rep. 299; White v. Stevens, 67 Mich. 33, 34 N. W. 255; New Decatur v. Berry, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827; Green v. Ward, 82 Va. 324; People ex rel. Winstanley v. Weber, 89 Ill. 347; Churchman v. City of Indianapolis, 110 Ind. 250, 11 N. E. 301; City of St. Louis v. Davidson, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; Murphy v. City of Louisville, 9 Bush (Ky.) 189; Welker v. Potter, 18 Ohio St. 85; Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077.

<sup>58</sup> Ante, §§ 73, 74; Young v. People ex rel. Raymond, 196 Ill. 603, 63 N. E. 1075.

persons are bound to take notice; and it need be here further noted only that a contract for a public improvement is one for personal services and skill, and not assignable without the consent of the municipality, and therefore that the assignee can maintain no action against the municipality for services rendered by him,<sup>59</sup> and also that, where the contract provides that matters of uncertainty or dispute arising under a contract in making the improvement shall be submitted for arbitration, no action can be maintained by either party without first offering to make such submission.<sup>60</sup>

#### *Authority for Contract*

It is one of the requisites essential to the validity of an improvement contract that the contract should correspond to or be within the scope of the ordinance authorizing the improvement.<sup>61</sup> To determine this question, particular attention should be directed to ascertaining whether the contract is (1) within the topographical limits prescribed in the ordinance;<sup>62</sup> (2) within the monetary limits fixed therein;<sup>63</sup> (3) of the nature of the improvement ordained by the council.<sup>64</sup> It is

<sup>59</sup> Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674.

<sup>60</sup> Phelan v. Mayor, etc., of City of New York, 119 N. Y. 86, 23 N. E. 175.

<sup>61</sup> Beaudry v. Valdez, 32 Cal. 269; Dougherty v. Hitchcock, 35 Cal. 512; Palmer v. Inhabitants of Haverhill, 98 Mass. 487; Haisch v. City of Seattle, 10 Wash. 435, 38 Pac. 1131; Young v. People ex rel. Raymond, 196 Ill. 603, 63 N. E. 1075; City of Boonville ex rel. Cosgrove v. Stephens (Mo. App.) 95 S. W. 314.

<sup>62</sup> People v. Mayor, etc., of City of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Rogers v. City of St. Paul, 22 Minn. 494; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566; Haisch v. City of Seattle, 10 Wash. 435, 38 Pac. 1131; Speer v. Mayor, etc., of City of Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; Craig v. City of Philadelphia, 89 Pa. 265.

<sup>63</sup> Dolese v. McDougall, 182 Ill. 486, 55 N. E. 547; McKee v. Town of Pendleton, 154 Ind. 652, 57 N. E. 532; Clarke v. City of Chicago, 185 Ill. 354, 57 N. E. 15.

<sup>64</sup> Church v. People ex rel. Kochersperger, 179 Ill. 205, 53 N. E. 554; Harrison v. City of Chicago, 163 Ill. 129, 44 N. E. 395; City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112; Beaudry v.

obvious that a contract to grade, gutter, and pave a particular street will not support a contract upon another and different street;<sup>65</sup> nor will an ordinance to expend ten thousand dollars in a specified improvement warrant a contract for the expenditure of fifteen thousand dollars for that purpose;<sup>66</sup> nor can a contract to repair a street be safely based upon an ordinance to grade and pave it.<sup>67</sup> The last distinction may become important because of the fact that in most jurisdictions local assessments for improvements are held not to warrant repair;<sup>68</sup> and so the means promised and given to the contractor in consideration of his work might be void. But such result would not ordinarily prevent recourse upon the municipal treasury for his compensation.<sup>69</sup> If the contract made should transgress the pecuniary limits or the section of the city prescribed in the ordinance, the contract would be void as to the excess of money promised, or the work outside the boundary limits of the ordinance.<sup>70</sup>

Valdez, 32 Cal. 269; Board of Councilmen of City of Frankfort v. Murray, 99 Ky. 422, 36 S. W. 180; City of Alton v. Middleton's Heirs, 158 Ill. 442, 41 N. E. 926; North Pacific L. & M. Co. v. East Portland, 14 Or. 3, 12 Pac. 4. But see Martindale v. Palmer, 52 Ind. 411.

<sup>65</sup> Willard v. Albertson, 23 Ind. App. 166, 54 N. E. 446.

<sup>66</sup> Clarke v. City of Chicago, 185 Ill. 354, 57 N. E. 15.

<sup>67</sup> O'Meara v. Green, 16 Mo. App. 118.

<sup>68</sup> Bullitt v. Selvage, 20 Ky. Law Rep. 599, 47 S. W. 255.

<sup>69</sup> City of Memphis v. Brown, 20 Wall. (U. S.) 289, 22 L. Ed. 264; Bill v. City of Denver (C. C.) 29 Fed. 344; Bucroft v. City of Council Bluffs, 63 Iowa, 646, 19 N. W. 807; Robertson v. City of Omaha, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534; Reilly v. Albany, 112 N. Y. 30, 19 N. E. 508; Michel v. Police Jury of Terrebonne, 9 La. Ann. 67; City of Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625.

<sup>70</sup> Ante, § 79. But under a statute giving a corporation authority to construct sewers within the municipality and beyond it, the town may construct sewers within its territorial limits, and in that of adjoining municipalities to secure an outlet. Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494. See Langley v. City Council of Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Le Feber v. West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917; City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786; Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. Law Rep. 238.

*Public Powers Inalienable*

As we have heretofore seen, no public corporation may in any way alienate or surrender the trust powers conferred upon it for the public welfare.<sup>71</sup> Of this nature are police powers, eminent domain, control of streets, and the like. A contract, therefore, with a gas or water company, though based upon a valid consideration, permitting it to use the streets of a city for the purpose of laying down its mains, cannot, as we have seen, obstruct a city in the exercise of any of these public powers; and the company cannot enjoin a contractor in the execution of a contract made by him with the city calling for grading below the level of the pipes, and thus requiring them to be relaid below the new level of the street.<sup>72</sup> Nor will a contract right of a street railway company to use the city streets prevent work under a contract to regrade the entire street, and thereby disturb the bed and track of the railway, even though the company had itself agreed to make the improvement.<sup>73</sup>

## DAMAGES

90. No action lies at common law against a municipal corporation for damages resulting to the property of an individual from the prosecution, with reasonable care and skill, of duly authorized works of municipal improvement.

This rigorous doctrine of the common law, though often contested in our American courts because of its rank injustice in individual cases, has nevertheless been fully maintained by them,<sup>74</sup> and the modifications or alterations found in the decisions of several of the states are due to constitutional or stat-

<sup>71</sup> See ante, § 77.

<sup>72</sup> Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. 665.

<sup>73</sup> Chicago, B. & Q. R. Co. v. City of Quincy, 139 Ill. 355, 28 N. E. 1069.

<sup>74</sup> Smith, to Use of Cushing, v. Washington, 20 How. (U. S.) 135, 15 L. Ed. 858; De Lucca v. City of North Little Rock (C. C.) 142 Fed.

utory changes in the common law. In the leading case of *O'Connor v. Mayor, etc., of City of Pittsburgh*,<sup>75</sup> in which, by a reduction of seventeen feet in the street grade, a church which had been erected according to directions of the city regulator was rendered worthless and required to be torn down, the court said: "We had this case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled not only in Pennsylvania, but by every decision in the sister states, except one. \* \* \* The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The Legislature that incorporated the city never dreamed that it was laying the foundation of such injustice, but as the charter stands it is unavoidable." The authority given the city by its charter was "to improve, repair, and keep in order the streets." The concurrence of decision in similar cases by the Supreme Courts of the United States,<sup>76</sup> of Massachusetts,<sup>77</sup> and of New York<sup>78</sup> in this view, and its adoption by all the other states but one,<sup>79</sup> leaves no doubt as to this doctrine of the common law as above stated. Chief Justice Gibson, in the *O'Connor Case*, above cited, ex-

597; *Sauer v. City of New York*, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176; *Watson v. City of Kingston*, 114 N. Y. 88, 21 N. E. 102; *Walish v. City of Milwaukee*, 95 Wis. 16, 69 N. W. 818; *Callender v. Marsh*, 1 Pick. (Mass.) 418; *O'Connor v. Mayor, etc., of City of Pittsburgh*, 18 Pa. 187; *Humes v. Mayor, etc., of Town of Knoxville*, 1 Hump. (Tenn.) 403, 34 Am. Dec. 657; *City of Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Goodall v. City of Milwaukee*, 5 Wis. 32; *Taylor v. City of St. Louis*, 14 Mo. 20, 55 Am. Dec. 89.

<sup>75</sup> 18 Pa. 187.

<sup>76</sup> *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. (U. S.) 166, 20 L. Ed. 557.

<sup>77</sup> *Brown v. City of Lowell*, 8 Metc. (Mass.) 172.

<sup>78</sup> *Radcliff's Ex'r's v. Mayor, etc., of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357.

<sup>79</sup> For a full half century, beginning with the cases of *Goodloe v. City of Cincinnati*, 4 Ohio, 500, 22 Am. Dec. 764, and *Smith v. City of Cincinnati*, 4 Ohio, 514, the Supreme Court of Ohio has maintained this exceptional position on the law of consequential damages for grading by a municipal corporation.

pressed the popular opinion in stating that "to obtain complete justice every damage to private property ought to be compensated by the state or corporation that occasions it, and a general statutory remedy ought to be provided to assess the value." It was ruled in that case<sup>80</sup> that, since the work of improvement did not trespass upon the land of the plaintiff, no property of the plaintiff was taken within the meaning of the constitutional provision requiring just compensation in case of exercise of the power of eminent domain, and therefore plaintiff could not evoke the protection of the Constitution. Since the decision in that case many states have incorporated into their Constitutions a provision that private property shall not be taken or damaged for public use without just compensation therefor;<sup>81</sup> and most of the other states have obtained the same result by legislative enactment.<sup>82</sup>

While the rule may be regarded as settled that a municipal corporation is not liable for consequential injuries due to the making of public improvements, so long as they are made in a careful and ordinarily skillful manner, it is, nevertheless, generally conceded that if the city is negligent in devising or adopting the plan of the improvement, or in executing the same, or if the authorities act unlawfully, the corporation is liable.<sup>83</sup>

<sup>80</sup> O'Connor v. Mayor, etc., of City of Pittsburgh, 18 Pa. 187.

<sup>81</sup> See Constitutions of California, Georgia, Illinois, Missouri, Nebraska, and West Virginia.

<sup>82</sup> The undoubted power of the Legislature to thus change the common-law rule was recognized and its use recommended by Chief Justice Gibson in O'Connor v. Mayor, etc., of City of Pittsburgh, supra, in 1851, and most of the states have made the change during the last half century.

<sup>83</sup> Davis v. City of Crawfordsville, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; Stein v. City of Lafayette, 6 Ind. App. 414, 33 N. E. 912; Leiper v. City and County of Denver, 36 Colo. 110, 85 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101, 10 Ann. Cas. 847; Smith, to Use of Cushing, v. Washington, 20 How. (U. S.) 135, 15 L. Ed. 858; City of North Vernon v. Voegeer, 103 Ind. 314, 2 N. E. 821; City of Bloomington v. Brokaw, 77 Ill. 194; Mayor, etc., of Town of Frostburg v. Hitchins, 70 Md. 56, 16 Atl. 380; Haubner v. City of Mil-

*Statutory Changes*

The details of the statutes giving a remedy to the property owner injured by the improvement are so various in the several states as to forbid our consideration. Only the general features can be referred to. In their purpose and effect they protect the property owner in his constitutional right to due process of law by providing for him a hearing before some competent tribunal, both as to the expediency of the improvement and the amount of the damages, and secure to him payment of the same out of the public treasury. But it is generally provided that the special damages suffered by each property holder may be set off by the special benefit to the property from the improvement.<sup>84</sup> This results practically in a comparison of the value of each particular piece of property at the beginning of the improvement with its value immediately after its completion. The award of damages is thus confined to those few instances in which the property is not enhanced in value by the improvement. The decisions upon this question, however, are not uniform, except in holding that allowance may be made for such benefits only as are not common to the general public.<sup>85</sup> Some cases hold that the set-off can be al-

waukee, 124 Wis. 153, 102 N. W. 578; Caldwell v. Town of Nashua, 122 Iowa, 179, 97 N. W. 1000; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 345; Platter v. City of Seymour, 86 Ind. 323.

<sup>84</sup> Clark v. City of Elizabeth, 61 N. J. Law, 565, 40 Atl. 616; Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552; Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Commissioners of Town of Asheville v. Johnston, 71 N. C. 398; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871.

<sup>85</sup> Kirkendall v. City of Omaha, 39 Neb. 1, 57 N. W. 752. The special benefits which may be applied in reduction of damages sustained by a property owner from a change in the street grade are not private improvements subsequently made by his neighbors, but only those local and peculiar benefits received by him from the change. Pickles v. Ansonia, 76 Conn. 278, 56 Atl. 552. See City of Joliet v. Adler, 71 Ill. App. 456; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; Grier v. Homestead Borough, 6 Pa. Super. Ct. 542, 42 Wkly. Notes Cas. 18; Chicago Union Traction Co. v. Chicago, 204 Ill. 363, 68 N. E. 519; Stowell v. Board of Public Works for City of New Bedford, 184

lowed only against incidental injury sustained,<sup>86</sup> while others allow it against the value of the land as well.<sup>87</sup> A few cases deny all right of set-off.<sup>88</sup>

#### *Remedies Provided*

The remedy also for obtaining compensation is various in the several states. In some of them the property holder must appear before the city council and there present his claim for damages, which damages are thereupon estimated by some tribunal provided by statute. In other cases a proceeding must be brought in court by the corporation against the property holder, wherein the property is condemned for the public use, and the damages therefor are duly ascertained; or, if the municipality shall omit to take this proceeding before entering upon its work of improvement, the property holder may bring it for the purpose of obtaining compensation, with practically the same result as if brought by the municipality. In some states a right of action at common law as for other damages is expressly given; and in some choice is allowed the property holder between two or more of these remedies, in which case the election of any one remedy excludes the others, and the decision thereunder is conclusive of his right.<sup>89</sup> This is based upon the doctrine, well established by many judicial decisions, that due process of law guaranteed by the

Mass. 416, 68 N. E. 675; Walsh v. City of Scranton, 23 Pa. Super. Ct. 276; Whitehead v. Manor Borough, 23 Pa. Super. Ct. 314.

<sup>86</sup> City of Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321. In Lux & Talbott Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014, the court held that in an action to recover assessments for a street improvement an abutting property owner cannot set up a counter-claim for damages arising out of the failure of the contractor to perform the work according to the contract, the work having been duly accepted by the city council.

<sup>87</sup> Putnam v. Douglas County, 6 Or. 328, 25 Am. Rep. 627; In re Root's Case, 77 Pa. 276.

<sup>88</sup> Israel v. Jewett, 29 Iowa, 475.

<sup>89</sup> Righter v. Mayor, etc., of City of Newark, 45 N. J. Law, 104; Brown v. City of Grand Rapids, 83 Mich. 101, 47 N. W. 117; Arends v. City of Kansas City, 57 Kan. 350, 46 Pac. 702; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351.

Constitution may be had as well by special proceedings before a special tribunal as by an action in court.<sup>90</sup> It has often been held that payment of damages must precede the taking of private property for public use;<sup>91</sup> but unless this is provided by statute it has generally been held sufficient that adequate provision is made for ascertaining and securing the compensation.<sup>92</sup> The property holder is entitled to demand compensation as soon as the appropriation has been definitely decided upon, without waiting for the actual taking.<sup>93</sup>

### SPECIAL ASSESSMENTS

91. Special assessments for municipal improvements are authorized and made upon the idea that property enhanced in value by such improvements should bear the expense thereof, not as a burden, but as compensation for benefits specially conferred thereby.

It is a fundamental doctrine of American jurisprudence that those receiving special benefits from the public should make compensation for them.<sup>94</sup> The application of this doctrine within municipal limits results in local assessments for special benefits conferred. The authority of the Legislature to provide for these local assessments has been established by

<sup>90</sup> City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Garvin v. Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Reclamation Dist. v. Goldman, 65 Cal. 638, 4 Pac. 678; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

<sup>91</sup> Hirth v. City of Indianapolis, 18 Ind. App. 673, 48 N. E. 876; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

<sup>92</sup> Sage v. City of Brooklyn, 89 N. Y. 189.

<sup>93</sup> Cooley, Const. Lim. (6th Ed.) 696. But in Devlin v. Philadelphia, 206 Pa. 518, 56 Atl. 21, the court said that no damages could be recovered for the establishment of a grade in a city until the actual work of grading has begun.

<sup>94</sup> 1 Hare, Const. Law, 301; Burrough, Tax'n, 460, 461.

repeated judicial decision declaring not only their constitutionality, but also their reasonableness.<sup>95</sup> For example, the Supreme Court of Missouri has happily said: "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. \* \* \* General taxation for a purely local purpose is unjust. It burdens those who are not benefited, and benefits those who are exempt from the burden."<sup>96</sup>

The principle underlying special assessments to meet the cost of public improvements is that the property on which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement.<sup>97</sup> So, likewise, the Supreme Court of Louisiana has declared that the system of paying for such improvements wholly out of the general treasury is inequitable, that often it results in great extravagance, abuse, and injustice, and that it is safer and juster to compel the particular locality specially benefited to bear specially the burden in whole or in part.<sup>98</sup>

On the other hand, imposing on the property owner a proportion of the cost of the improvement in substantial excess

<sup>95</sup> Cooley, *Const. Lim.* (6th Ed.) 614, citing *People v. Mayor, etc., of City of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Hammett v. City of Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *City of Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *City of Chicago v. Larned*, 34 Ill. 203; *Hines v. Leavenworth*, 3 Kan. 186; *Farrar v. City of St. Louis*, 80 Mo. 380; *Burnett v. Mayor, etc., of City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Richardson v. Morgan*, 16 La. Ann. 429; *Baker v. City of Cincinnati*, 11 Ohio St. 534; *State v. Dean*, 23 N. J. Law, 335; *City of Fairfield v. Ratcliff*, 20 Iowa, 396; *McGehee v. Mathis*, 21 Ark. 40; *Palmer v. Stumph*, 29 Ind. 329; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Cain v. Davie County Commissioners*, 86 N. C. 8; *Norfolk City v. Ellis*, 26 Grat. (Va.) 224; *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701; *Roundtree v. City of Galveston*, 42 Tex. 612. See, also, *City of Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65.

<sup>96</sup> *Lockwood v. City of St. Louis*, 24 Mo. 20.

<sup>97</sup> *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443.

<sup>98</sup> *Municipality No. 2 v. Dunn*, 10 La. Ann. 57.

of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. To be objectionable on this ground, however, the excess must be substantial, because exact equality of taxation is not always attainable.<sup>99</sup>

The idea underlying these special levies is that no injustice can result from requiring property enhanced in value by local improvements to pay the cost thereof, especially when this is less than the enhancement; and the possibility of injustice is lessened, if not, indeed, removed, when compensation is provided for damages sustained from these improvements.<sup>1</sup>

#### *Municipal Discretion—Due Process of Law*

Whether a given improvement is expedient and necessary, and whether it is general or local, are legislative questions; and when the municipality is vested with power to determine them the municipal decision is conclusive, and not subject to review by the courts.<sup>2</sup> This general doctrine is modified by decisions in some states that there may be judicial inquiry on charge of fraud, mistake, oppression, or corruption,<sup>3</sup> and, if sustained, the court may vacate the municipal ordinance or enjoin the work of improvement.<sup>4</sup> It has also been held that

<sup>99</sup> *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443.

<sup>1</sup> See ante, § 90. Special benefits are the basis of special assessments: and assessment without benefit, and the obvious excess of levy over benefit, have been declared to be confiscation, and properly enjoined. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.

<sup>2</sup> See ante, § 88, p. —.

<sup>3</sup> *City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366; *Dempster v. City of Chicago*, 175 Ill. 278, 51 N. E. 710; *Dewey v. City of Des Moines*, 101 Iowa, 416, 70 N. W. 605; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682.

<sup>4</sup> *Niver v. Village of Bath-on-the-Hudson*, 27 Misc. Rep. 605, 58 N. Y. Supp. 270; *Richter v. City of New York*, 24 Misc. Rep. 613, 54 N. Y. Supp. 150; *Holmes v. Village of Hyde Park*, 121 Ill. 128, 13 N. E. 540.

similar remedy may be employed in case where local assessment has been made for what is obviously a work of general municipal improvement.<sup>5</sup> Where discretion is to be exercised by any tribunal in determining whether a special assessment shall be levied, or what portion shall be imposed upon particular property, each owner is entitled, under constitutional guaranty of due process of law, to such notice as will enable him to challenge the expediency of the improvement or the justice of the levy.<sup>6</sup> It has also been held that this notice need not necessarily be in limine, but is sufficient if given in due time to permit an appearance and contest upon all matters affecting his rights and interests under the improvement.<sup>7</sup> But it seems no notice is necessary where the improvement is ordained by legislative enactment, allowing no discretion to the common council, and making the levy a mere matter of mathematical calculation, as upon the basis of frontage.<sup>8</sup>

#### *Apportioning Assessments*

As already indicated, the theory of special assessments is that those who receive special benefits in the municipality are therefore liable to special burdens of taxation. If a particular street is to be graded, guttered, curbed, and paved, the expense of this special improvement should be borne by the lot owners upon that street.<sup>9</sup> So, also, of sidewalks, sewers, and drains for a particular locality;<sup>10</sup> and so, in general,

<sup>5</sup> City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366.

<sup>6</sup> Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Ulman v. Mayor, etc., of City of Baltimore, 72 Md. 587, 20 Atl. 141, 11 L. R. A. 224; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

<sup>7</sup> City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117.

<sup>8</sup> Amery v. City of Keokuk, 72 Iowa, 701, 30 N. W. 780.

<sup>9</sup> Hale v. City of Kenosha, 29 Wis. 599; Dorgan v. City of Boston, 12 Allen (Mass.) 223; State v. Reis, 38 Minn. 371, 38 N. W. 97; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; City of Lafayette v. Fowler, 34 Ind. 140.

<sup>10</sup> PALMER v. CITY OF DANVILLE, 154 Ill. 156, 38 N. E. 1067, Cooley, Cas. Mun. Corp. 202, 225; Wolf v. City of Philadelphia, 105

wherever the municipality, in the exercise of its charter powers, incurs an extraordinary expense for the special benefit of a particular portion of the city, it may in the exercise of its power of apportionment impose upon that locality special taxes sufficient to pay the entire amount of this extraordinary expense, or such portion thereof as it may deem proper.<sup>11</sup> This general doctrine of the law, however, is subject to exception in some states wherein it has been held that the constitutional provision for equality and uniformity of taxation prevent such special assessment for local improvements.<sup>12</sup> The power to make local assessments exists only in those municipalities upon which it has been specially conferred.<sup>13</sup> It is not to be implied from the general power of taxation.<sup>14</sup> In Tennessee the peculiar rule exists that abutters may be

Pa. 25; *Grunewald v. Cedar Rapids*, 118 Iowa, 222, 91 N. W. 1059; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479; *Wright v. City of Boston*, 9 Cush. (Mass.) 233.

<sup>11</sup> *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Illinois Central R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132; *CITY OF RALEIGH v. PEACE*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, Cooley, Cas. Mun. Corp. 218; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611.

<sup>12</sup> *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Mayor, etc., of Mobile v. Dargan*, 45 Ala. 310; *Stinson v. Smith*, 8 Minn. 366 (Gil. 326).

<sup>13</sup> *City of Fairfield v. Ratcliff*, 20 Iowa, 396; *Mayor, etc., of City of Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161; *State v. Mayor, etc., of Ashland*, 71 Wis. 502, 37 N. W. 809; *Drake v. Phillips*, 40 Ill. 388; *Flewelling v. Proetzel*, 80 Tex. 191, 15 S. W. 1043; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *McNamara v. Estes*, 22 Iowa, 246; *Reed v. City of Toledo*, 18 Ohio, 161; *Vance v. City of Little Rock*, 30 Ark. 435.

The only basis on which special taxation or special assessments can be sustained is that the property subject to assessment or taxation will be enhanced in value to the extent of the burden imposed. *City of Butte v. School Dist. No. 1*, 29 Mont. 336, 74 Pac. 869.

<sup>14</sup> *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *First Presbyterian Church of Ft. Wayne v. City of Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35; *Appeal of Powers*, 29 Mich. 504; *Sharp v. Speir*, 4 Hill (N. Y.) 76.

taxed for the cost of constructing sidewalks in front of their property, but not for curbing, guttering, and paving.<sup>15</sup>

Two methods are in common use for fixing the basis for apportioning the assessment upon the separate lots in a locality: (1) An assessment according to a standard fixed in the enabling act, and applicable to lots by measurements of frontage, surface, or value; (2) an assessment made by commissioners or a jury of view upon the basis of the benefit estimated by them to be conferred upon each lot by the proposed improvement.<sup>16</sup> The frontage rule is the one in common use, and has been sustained by repeated adjudication,<sup>17</sup> though there

<sup>15</sup> Mayor, etc., of Town of Franklin v. Maberry, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315; Whyte v. Mayor, etc., of Town of Nashville, 2 Swan (Tenn.) 369; Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

<sup>16</sup> RAYMOND'S ESTATE v. BOROUGH OF RUTHERFORD, 55 N. J. Law, 441, 27 Atl. 172, Cooley, Cas. Mun. Corp. 216.

<sup>17</sup> Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230; Parker v. Challiss, 9 Kan. 155; Magee v. Commonwealth, to Use of City of Pittsburgh, 46 Pa. 358; Bacon v. City of Savannah, 86 Ga. 301, 12 S. E. 580; Whiting v. Quackenbush, 54 Cal. 306; City of Pueblo v. Robinson, 12 Colo. 593, 21 Pac. 899; Wilder v. City of Cincinnati, 26 Ohio St. 284; Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646; Beaumont v. City of Wilkes-Barre, 142 Pa. 198, 21 Atl. 888; Wilbur v. City of Springfield, 123 Ill. 395, 14 N. E. 871; Allen v. Drew, 44 Vt. 174; King v. City of Portland, 2 Or. 146; Ulman v. Mayor, etc., of City of Baltimore, 72 Md. 587, 20 Atl. 141, 11 L. R. A. 224; White v. People ex rel. City of Bloomington, 94 Ill. 604; CITY OF RALEIGH v. PEACE, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, Cooley, Cas. Mun. Corp. 218; State v. Reis, 38 Minn. 371, 38 N. W. 97; Hand v. City Council of City of Elizabeth, 30 N. J. Law, 365; Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127; Cleveland v. Tripp, 13 R. I. 50; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535; O'Reilly v. City of Kingston, 114 N. Y. 439, 21 N. E. 1004; Heman Const. Co. v. McManus, 102 Mo. App. 649, 77 S. W. 310; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; City of Kalamazoo v. Francoise, 115 Mich. 554, 73 N. W. 801; PAYNE v. VILLAGE OF SOUTH SPRINGFIELD, 161 Ill. 285, 44 N. E. 105, Cooley, Cas. Mun. Corp. 203; Emery v. San Francisco Gas Co., 28 Cal. 345; Walsh v. Matthews, 29 Cal. 123; City of Cincinnati v. Wilder, 6 Ohio Dec. 1046; Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; Maloy v. City of Marietta, 11 Ohio St. 636; Mayor, etc., of Jersey City v. Howeth, 30 N. J. Law, 521.

are some cases holding to the contrary.<sup>18</sup> By this method the entire cost of a given street improvement is apportioned among the lots fronting thereon according to the respective frontage of each lot on the street.

The method of apportioning the cost according to area of the land benefited is often used in the case of sewer construction.<sup>19</sup> A street or sewer assessment may be made for the whole street or a part thereof, even to a single block;<sup>20</sup> and different streets, it seems, may be included in the same assessment.<sup>21</sup> A valid assessment can only be made in pursuance of the method prescribed by law.<sup>22</sup>

<sup>18</sup> *Clapp v. City of Hartford*, 35 Conn. 66; *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734; *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Agens v. Mayor, etc., of City of Newark*, 37 N. J. Law, 415, 18 Am. Rep. 729; *Seely v. City of Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Warren v. City of Grand Haven*, 30 Mich. 24; *Peay v. City of Little Rock*, 32 Ark. 31.

<sup>19</sup> *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639; *Grimmell v. City of Des Moines*, 57 Iowa, 144, 10 N. W. 330; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114. But see *Auditor General v. O'Neill*, 143 Mich. 343, 106 N. W. 895.

<sup>20</sup> *Scovill v. City of Cleveland*, 1 Ohio St. 126; *Schenley v. Com., to Use of City of Allegheny*, 36 Pa. 29, 78 Am. Dec. 359; *Brevoort v. City of Detroit*, 24 Mich. 322; *Parker v. Challiss*, 9 Kan. 155.

<sup>21</sup> *Allen v. City of Davenport*, 107 Iowa, 90, 77 N. W. 532; *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871; *Mayall v. City of St. Paul*, 30 Minn. 294, 15 N. W. 170; *In re Walter*, 75 N. Y. 354. *Contra*, *Arnold v. City of Cambridge*, 106 Mass. 352.

<sup>22</sup> *Bower v. Bainbridge*, 116 Ga. 794, 43 S. E. 67; *Newman v. City of Emporia*, 32 Kan. 456, 4 Pac. 815; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480, 32 L. Ed. 899; *Zottman v. City and County of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Flewelling v. Proetzel*, 80 Tex. 191, 15 S. W. 1043; *White v. Bayonne*, 49 N. J. Law, 311, 8 Atl. 295; *White v. City of Saginaw*, 67 Mich. 33, 34 N. W. 255; *Hawthorne v. City of East Portland*, 13 Or. 271, 10 Pac. 242; *Allen v. City of Galveston*, 51 Tex. 302; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077; *Lott v. Ross*, 38 Ala. 156; *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301; *City of Lowell v. Wheelock*, 11 Cush. (Mass.) 391.

*Property Liable*

While an assessment for improvements is not in a strict sense a tax, yet it so far partakes of the nature of a tax as to make it operative, generally, only on property subject to taxation,<sup>23</sup> though it must be borne in mind that exemption from taxation does not necessarily exempt from local assessments. And as has been already noticed, only such property as is benefited by the improvement is subject to assessment therefor. The question of liability of various kinds of property to assessment depends on the local statutes. For example, under some statutes vacant unimproved lands are exempt from assessment,<sup>24</sup> while in other jurisdictions such lands are assessable if special benefits will result from the improvement.<sup>25</sup>

It is generally no objection to the assessment of lands lying within the city limits that they are unplatted and used for agricultural purposes.<sup>26</sup>

There are numerous conflicting decisions as to the liability of railroad property to assessment, the conflict arising generally because of differences in the local statutes. Generally, railroad lands used for roundhouses, depots, terminal yards, etc., are assessable,<sup>27</sup> though as to right of way, roadbeds, etc., the decisions are conflicting.<sup>28</sup>

<sup>23</sup> Lowe v. Board of Com'rs of Howard County, 94 Ind. 553.

<sup>24</sup> Provident Inst. for Savings v. Allen, 37 N. J. Eq. 36; City of Atlanta v. Gabbett, 93 Ga. 266, 20 S. E. 306.

<sup>25</sup> Warren v. City of Chicago, 118 Ill. 329, 11 N. E. 218; Medland v. Linton, 60 Neb. 249, 82 N. W. 866.

<sup>26</sup> Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Barber Asphalt Pav. Co. v. Garr, 115 Ky. 334, 73 S. W. 1106; Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721.

<sup>27</sup> Atchison, T. & S. F. R. Co. v. Peterson, 5 Kan. App. 103, 48 Pac. 877, affirmed 58 Kan. 818, 51 Pac. 290; City of Philadelphia v. Philadelphia & R. R. Co., 177 Pa. 292, 35 Atl. 610; Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112.

<sup>28</sup> South Park Com'rs v. Chicago, B. & Q. R. Co., 107 Ill. 105; Detroit, G. H. & M. Ry. Co. v. City of Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. Rep. 466; Illinois Cent. R.

*Exemptions*

Local assessment is obviously an exercise of the taxing power; and yet such assessments have generally been held not to come within the meaning of the word "taxation" as used in clauses of revenue statutes exempting certain property from taxation.<sup>29</sup> For example, "all public taxes"<sup>30</sup> has been held not to embrace local assessments. So also of the phrases "rates and assessments";<sup>31</sup> "taxation of every kind";<sup>32</sup> "taxation of every description";<sup>33</sup> "all taxes, either state, parish, or city";<sup>34</sup> "all and every county, road, city, and school tax";<sup>35</sup> "taxes of every kind";<sup>36</sup> "charges and impositions";<sup>37</sup> "any tax or public imposition whatever";<sup>38</sup> "taxes,

Co. v. City of Kankakee, 164 Ill. 608, 45 N. E. 971; Pittsburgh, C., C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741, 11 Ann. Cas. 808; Minneapolis & St. L. R. Co. v. Linquist, 119 Iowa, 144, 93 N. W. 103; Chatham County Com'rs v. Seaboard A. L. R. Co., 133 N. C. 216, 45 S. E. 566.

<sup>29</sup> Adams County v. City of Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Washburn Memorial Orphan Asylum v. State, 73 Minn. 343, 76 N. W. 204; Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979; Ford v. Delta & P. Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590; Lima v. Lima Cemetery Ass'n, 42 Ohio St. 128, 51 Am. Rep. 809; City of Atlanta v. First Presbyterian Church, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852; Olive Cemetery Co. v. City of Philadelphia, 93 Pa. 129, 39 Am. Rep. 132; In re Mayor, etc., of City of New York, 11 Johns. (N. Y.) 77; Mayor, etc., of City of Baltimore v. Proprietors of Green Mount Cemetery, 7 Md. 517.

<sup>30</sup> Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506.

<sup>31</sup> Northern Liberties v. St. John's Church, 13 Pa. 104.

<sup>32</sup> Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412.

<sup>33</sup> President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385.

<sup>34</sup> City of Lafayette v. Male Orphan Asylum, 4 La. Ann. 1.

<sup>35</sup> Trustees of Illinois & M. Canal v. City of Chicago, 12 Ill. 403.

<sup>36</sup> Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613.

<sup>37</sup> Mayor, etc., of City of Baltimore v. Proprietors of Green Mount Cemetery, 7 Md. 517.

<sup>38</sup> City of Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63.

charges, and impositions." <sup>39</sup> In short, exemption from general taxation does not exempt from local assessment. But it has been held that "exemption from all assessments and taxes whatever by the city" exempts from local assessment; <sup>40</sup> and so also of exemptions from "all civil impositions, taxes, and rates." <sup>41</sup> It is a question of legislative intention, to be ascertained by statutory interpretation, and it has been held to be constitutional for the legislature to exempt from special assessment as well as from general taxation.<sup>42</sup>

### ENFORCING COLLECTION

92. Special assessments, being charges upon particular property, may be collected by enforcing the lien on the property in the method prescribed by the statute. In some states they have been held to afford ground for personal judgment against the property owner; but the weight of authority, as well as the reason of the matter, opposes such remedy for the enforcement of a special assessment.

Generally, by the provisions of the city charter or by statute, assessments are made a lien on the property benefited by the improvement. No valid lien exists, however, unless the assessment has been made in substantial compliance with the

<sup>39</sup> New Jersey R. & Transp. Co. v. Mayor, etc., of City of Newark, 27 N. J. Law, 185.

<sup>40</sup> First Division of St. Paul & P. R. Co. v. City of St. Paul, 21 Minn. 526.

<sup>41</sup> President, etc., of Harvard College v. Board of Aldermen of City of Boston, 104 Mass. 470.

<sup>42</sup> Dyker Meadow Land & Improvement Co. v. Cook, 3 App. Div. 164, 38 N. Y. Supp. 222; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248; City of Richmond v. Richmond & D. R. Co., 21 Grat. (Va.) 604.

provisions of the enabling act.<sup>43</sup> So, too, the formalities prescribed to perfect the lien must be complied with.<sup>44</sup>

When these have been complied with, the lien becomes fixed in favor of the city, and is not impaired by official misconduct or defective performance in the work of improvement.<sup>45</sup> The city usually provides in its contract for improvement that the contractor shall receive these liens in compensation for performance of his contract, and they are then subject to enforcement according as the local law may provide—by the contractor as assignee, or by the city for his use and benefit. In either case the assessment levy must be satisfied, and the owner cannot enjoin the same or recoup for damages resulting from failure of or defect in the work of improvement after it has been accepted by the duly constituted authorities.<sup>46</sup>

<sup>43</sup> *Inhabitants of Village of Houstonia v. Grubbs*, 80 Mo. App. 433; *Huff v. City of Jacksonville*, 39 Fla. 1, 21 South. 776; *Rosetta Gravel Paving & Improvement Co. v. Jollisaint*, 51 La. Ann. 804, 25 South. 477; *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726.

A levy of a special assessment for the construction of an improvement is necessary to the creation of a lien, so that, where no levy has been made by the city council, no lien will be created by certifying the expense of the improvement to the council. *Hall v. Moore*, 3 Neb. (Unof.) 92 N. W. 294. See *Cemansky v. Fitch*, 121 Iowa, 186, 96 N. W. 754, where it was held that the lien attached at the time that the certificate of the resolution for the improvement was filed by the city clerk with the county auditor as required by statute, though the work had been previously completed. Special assessments do not become liens save as made so by statutory authority. *Id.*

<sup>44</sup> *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025; *Gans v. City of Philadelphia*, 102 Pa. 97; *City of Hartford v. Mechanics Savings Bank*, 79 Conn. 38, 63 Atl. 658; *Cemansky v. Fitch*, 121 Iowa, 186, 96 N. W. 754; *Hoag v. Ward*, 186 Mo. 325, 85 S. W. 391.

<sup>45</sup> *Dressman v. Farmers' & Traders' Nat. Bank*, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; *Makley v. Whitmore*, 61 Ohio St. 587, 56 N. E. 461; *Adams v. City of Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; *Conlin v. Seaman*, 22 Cal. 549; *City of Lowell v. Hadley*, 8 Metc. (Mass.) 194; *Williams v. Holden*, 4 Wend. (N. Y.) 227.

<sup>46</sup> *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689; *City of Henderson v. Lambert*, 14 Bush (Ky.) 24; *McDonald v. Murphree*, 45

*Personal Liability*

The power of the Legislature to declare a local assessment to be a personal charge against the owner as well as a lien upon his property has been strenuously contested in many states, while in others it has been allowed to pass unchallenged. The cases supporting and denying this power are perhaps nearly equal in number; but recent judicial tendency, and probably the majority of seriously contested cases, concur with text-writers in denying the power of the Legislature to make a personal charge out of this character of assessments.<sup>47</sup> On the one hand, it is contended that such personal charge is

Miss. 705; Douglass v. Town of Harrisville, 9 W. Va. 162, 27 Am. Rep. 548; Inhabitants of Towns of Windsor & Suffield v. Field, 1 Conn. 284; Hovey v. Mayo, 43 Me. 322; Chinn v. Trustees, etc., 32 Ohio St. 238; Vanderbeck v. Mayor, etc., of Jersey City, 29 N. J. Law, 441; City of Peoria v. Kidder, 26 Ill. 358; Old Colony R. Co. v. Fall River, 147 Mass. 455, 18 N. E. 425; Taylor v. Palmer, 31 Cal. 240; Gage v. Evans, 90 Ill. 569; Cochran v. Collins, 29 Cal. 129; Heywood v. City of Buffalo, 14 N. Y. 534; Hughes v. Kline, 30 Pa. 230; Strenna v. City Council of Montgomery, 86 Ala. 340, 5 South. 115. Where during the time improvements were being made opposite the owner's property he knew the work was being done and took no steps to prevent the same and did not object thereto, he was estopped from questioning his liability for a portion of the expense assessed against the property. Nowlen v. Benton Harbor, 134 Mich. 401, 96 N. W. 450.

<sup>47</sup> City of Seattle v. Yesler, 1 Wash. T. 571; Meyer v. City of Covington, 103 Ky. 546, 45 S. W. 769; Heman Const. Co. v. Loevy, 179 Mo. 455, 78 S. W. 613; City of Omaha v. State, 69 Neb. 29, 94 N. W. 979; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Manning v. Den, 90 Cal. 610, 27 Pac. 435; Green v. Ward, 82 Va. 324; CITY OF RALEIGH v. PEACE, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, Cooley, Cas. Mun. Corp. 218; Broadway Baptist Church v. McAtee, 8 Bush (Ky.) 508, 8 Am. Rep. 480; Craw v. Village of Tolono, 96 Ill. 255, 36 Am. Rep. 143; City of Burlington v. Quick, 47 Iowa, 222; Higgins v. Ausmuss, 77 Mo. 351. Contra: Clemens v. Mayor, etc., of Baltimore, 16 Md. 208; Bennett v. City of Buffalo, 17 N. Y. 383; Hazzard v. Heacock, 39 Ind. 172; City of Lowell v. French, 6 Cush. (Mass.) 223; City of New Orleans v. Wire, 20 La. Ann. 500; Bonsall v. Mayor, etc., of Town of Lebanon, 19 Ohio, 419; Lovell v. City of St. Paul, 10 Minn. 290 (Gil. 229).

opposed to the definition of a "local assessment," and that the municipality may always protect itself in any proper improvement by purchasing the property for its assessment;<sup>48</sup> to which it has been replied that "it is not land the government needs; it is money. The tax is assessed in money, to be paid by the owner of the money."<sup>49</sup> In an Alaska case it was held that abutting property owners who had petitioned the city for a specific street improvement, and had seen the improvement made in accordance with their petition in front of their property, were liable to the municipality for the cost of the same in an action of assumpsit upon an implied contract for materials furnished and work and labor done.<sup>50</sup>

<sup>48</sup> Elliott, Roads & S. § 400.

<sup>49</sup> Brown, J., in Litchfield v. McComber, 42 Barb. (N. Y.) 288.

<sup>50</sup> Town of Nome v. Lang, 1 Alaska, 593.

## CHAPTER X

### POLICE POWERS AND REGULATIONS

93. Essential to a Municipality.
94. Delegation.
95. Extent and Limitation of Power.
96. Exercise of Power.
97. Double Police Power.
98. Peace and Order.
99. Sanitation.
100. Safety..
101. Comfort.
102. Occupations and Amusements.
103. Markets.
104. Violation and Enforcement.

### ESSENTIAL TO A MUNICIPALITY

93. The police power, inherent in the state as a paramount and inalienable attribute of sovereignty, is essential to a municipality as a public corporation.

The English conception of the police power is thus given by Blackstone: "The due regulation and domestic rule of the kingdom whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."<sup>1</sup> As a paramount sovereign power, its lineage may be traced to the ancient maxim, "Salus populi est suprema lex." It is the expression of that instinct of self-preservation inherent in every animate creature, and attributed as essential to all nations, states, and corporations, whether public or private. It is the inherent faculty and function of life itself; and no person, natural or artificial, no state or corporation, to which this right and pow-

<sup>1</sup> 4 Bl. Comm. 162.

er is denied, has any real life, and its bare existence will be ephemeral, barren, and useless. It is an adaptation to public use of that ancient Latin maxim, "Sic utere tuo ut alienum non laedas," and not only requires from the owner of property due respect and consideration for his neighbor's rights, but in case of emergency warrants the destruction of property without compensation to an owner, who is wholly without fault. This extraordinary and dangerous power is not of constitutional origin or grant.<sup>2</sup> It is institutional and inherent in government; and, as wisely remarked by Chief Justice Shaw, "it is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise."<sup>3</sup> Many attempts have been made to define the police power, but never with entire success.<sup>4</sup> It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself, which will be accurate.<sup>5</sup>

There are constitutional limitations upon it,<sup>6</sup> but they are not always of easy application; and, since it is essentially a discretionary power, its chief limitation has been found in that common reason of enlightened judicial tribunals which was declared by Lord Coke to be the "very life of the common law."<sup>7</sup> When exercised by due process of law, as in the abatement of nuisances through civil or criminal proceeding, this power is usually found to be wholesome and beneficial.

<sup>2</sup> Harmon v. City of Chicago, 110 Ill. 400, 51 Am. Rep. 698; Taylor v. Nashville & C. R. Co., 6 Cold. (Tenn.) 646, 98 Am. Dec. 474; Village of Carthage v. Frederick, 122 N. Y. 273, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490.

<sup>3</sup> Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; Commonwealth v. Alger, 7 Cush. (Mass.) 53; Thorpe v. Rutland & B. R. Co., 27 Vt. 140, 62 Am. Dec. 625. Cf. Cooley, Const. Lim. (6th Ed.) 704.

<sup>4</sup> Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

<sup>5</sup> A police regulation operating unreasonably beyond the occasions of the enactment is not invalid because it may affect incidentally the exercise of some right guaranteed by the Constitution. Anderson v. State, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

<sup>6</sup> Co. Litt. 97, 183.

Its summary exercise is always perilous to private right, and often cruelly unjust; as when in emergency, apparent or real, the property of one is sacrificed for the protection of others, or one is deprived of his personal liberty for the supposed safety of the many.

### DELEGATION

94. The police power may be delegated by the state to a municipal corporation as a public function to be exercised within proper limits for all appropriate municipal purposes.

#### *Delegation by the State*

As we have heretofore seen,<sup>7</sup> the delegation of legislative power to a municipality, after much contention, has been established as constitutional by repeated adjudication. No stronger case can be made against this than in the matter of the police power. This is the paramount power in the state. It is supremely sovereign in its nature, involving discretion in its exercise, and often consequent deprivation and destruction. But even this great power has been so long exercised by municipal corporations, has been found so essential to the public welfare, and its delegation has been so often sustained by judicial decision, as to be established beyond question.<sup>8</sup> The extent of its exercise is always within the legislative con-

<sup>7</sup> *Ante*, § 49.

<sup>8</sup> *People v. Pierce*, 85 App. Div. 125, 83 N. Y. Supp. 79; *CITY OF CRAWFORDSVILLE v. BRADEN*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214, Cooley, Cas. Mun. Corp. 100; *City of Burlingame v. Thompson*, 74 Kan. 393, 86 Pac. 449; 1 Dill. Mun. Corp. (5th Ed.) § 301, 2 Id. § 573; *Elliott, Mun. Corp.* § 89; *Tied. Mun. Corp.* §§ 116, 147; *2 Beach, Pub. Corp.* §§ 249, 582.

While the Legislature usually delegates to local authorities the regulation and control of the public rights in the streets, it may at any time resume such authority and exercise as it deems best. *New England Telephone & Telegraph Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *Boston Electric Light Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835.

trol. The police power delegated may be total or partial, or it may be entirely withheld by the Legislature from the municipality. It has been decided, however, in some cases that a certain measure of police power is one of the inherent or essential powers of a municipality, for which no legislative grant is necessary,<sup>9</sup> being, as we have seen in the last section, an essential attribute of all life, corporate and individual. It is usual for the charter to contain an express grant of police powers, or the same may be easily implied from the power granted to pass ordinances regulating conduct, commerce, business, and general welfare in the municipality.

#### *Delegation by Municipality*

The power thus granted, being peculiarly governmental, is one which the municipality must exercise for the public welfare, and which it may not either directly or indirectly abridge or alienate.<sup>10</sup> It has accordingly been held that a city council cannot bind itself nor its successors by contract to a course of conduct or of municipal inaction derogatory to the police power delegated by the state to the municipality.<sup>11</sup>

<sup>9</sup> Vionet v. First Municipality, 4 La. Ann. 42; Gundling v. City of Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230.

The Legislature may invest municipal corporations with the police power of the state, in whole or in part, in the absence of constitutional prohibition. City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723.

<sup>10</sup> State ex rel. McClellan v. Graves, 19 Md. 351, 81 Am. Dec. 639; Petz v. City of Detroit, 95 Mich. 169, 54 N. W. 644; City of Lambertville v. Applegate, 73 N. J. Law, 110, 62 Atl. 270; City of Petersburg v. Petersburg Aqueduct Co., 102 Va. 654, 47 S. E. 848; Kittanning Electric Light, Heat & Power Co. v. Kittanning Borough, 11 Pa. Super. Ct. 31; City of McKeesport v. McKeesport & R. Passenger Ry. Co., 2 Pa. Super. Ct. 242; Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904, 34 South. 868.

A city cannot by contract divest itself of the power to enforce proper police regulations. City of Carbondale v. Wade, 106 Ill. App. 654.

<sup>11</sup> Davenport v. Richmond City, 81 Va. 636, 59 Am. Rep. 694; State ex rel. City of Duluth v. Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269, affirmed in 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824; Davis v. Mayor,

## EXTENT AND LIMITATION OF POWER

95. Those powers conferred upon a municipal corporation which in their exercise conduce to protect the public safety and health and promote the comfort and convenience of the citizens and the general welfare of the municipality manifest the legislative intention in regard to the delegation of the police power to the municipality.

### *Extent of Power*

The extent to which municipalities may exercise the police power is not dependent upon the size of the city or village, but upon the charter grant of powers. A small village may thus have as much police power as a large city.<sup>12</sup> The phrase "police powers" has often been used in the charter as expressing the legislative grant to the municipality. In such case the city may pass reasonable ordinances for the protection of the lives, limbs, health, comfort, and quiet of its citizens;<sup>13</sup> and it has been held that such measure of police power as this is inherent in a municipal corporation, as being essential to the performance of its municipal functions as a public agency

etc., of City of New York, 14 N. Y. 506, 67 Am. Dec. 186; Britton v. Mayor, etc., of New York, 21 How. Prac. (N. Y.) 251; Mayor, etc., of City of New York v. Britton, 12 Abb. Prac. (N. Y.) 367; Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 5 L. Ed. 339.

<sup>12</sup> City of Owensboro v. Sparks, 99 Ky. 351, 36 S. W. 4; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145.

<sup>13</sup> The police power of a city extends to the regulation of water rates. City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

A city may have a building demolished as unsafe. O'Rourke v. City of New Orleans, 106 La. 318, 30 South. 837.

The charter of the city of Chicago gives the city power to limit the fare to be charged by street railways, and it was held in Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631, that, as a necessary incident to such power, it could enact ordinances requiring street railway companies to furnish transfer tickets entitling passengers to ride on a connecting line of the same company without the payment of an additional fare.

of the commonwealth.<sup>14</sup> Usually there is found in the charter separate mention of the various subjects over which police power may be exercised, and over some of them the municipal control given may be only partial or imperfect. In such case the maxim, "Expressio unius est exclusio alterius," is often applied, and under a general grant of police power the municipality has been limited to the subjects specially mentioned, or at most to those and such others as absolutely require the exercise of this power for the welfare of the community.<sup>15</sup>

It is, however, generally recognized that under a general grant of police powers, or under the general welfare clause, municipal corporations may by appropriate regulations adopt such measures as may be necessary and reasonable to preserve peace and order, the health, safety, and comfort of their citizens, and control and regulate occupations, amusements, etc.<sup>16</sup>

#### *Limitation of Power*

The police power of a state is not absolute, and its exercise is subject to review by the courts.<sup>17</sup> Neither the legislature nor a municipality can, under the guise of police regulation, arbitrarily invade personal or property rights; and when

<sup>14</sup> *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

<sup>15</sup> *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Carey v. Washington*, 5 Cranch, C. C. 13, Fed. Cas. No. 2,404.

<sup>16</sup> 3 *McQuillan, Mun. Corp.* § 895. And see *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235; *Crum v. Bray*, 121 Ga. 709, 49 S. E. 686, 1 Ann. Cas. 991; *Village of Fairmont v. Meyer*, 83 Minn. 456, 86 N. W. 457; *Commonwealth v. Cutter*, 156 Mass. 52, 29 N. E. 1146; *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 71 N. J. Law, 75, 58 Atl. 343.

<sup>17</sup> *Moeschen v. Tenement House Dept. of City of New York*, 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328; *In re Smith*, 143 Cal. 368, 77 Pac. 180; *Price v. People*, 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306.

Unless the court can see that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to protect the public health, safety, comfort, or morals, the decision of the Legislature as to necessity, or reasonableness is conclusive. *Odd Fellows' Cemetery Ass'n v. City and County of San Francisco*, 140 Cal. 226, 73 Pac. 987.

such regulations are called in question the test should be whether they have some relation to the public welfare, and whether such is in fact the end sought to be attained. If not, they should be declared invalid as exceeding the legislative power.<sup>18</sup> If, however, the regulations are within the power, the courts have nothing to do with the wisdom, policy, or expediency of the law; the power to make it necessarily carrying with it the power to judge of its necessity, expediency, and justice, and primarily, at least, of the reasonableness of the means used to accomplish the end sought.<sup>19</sup>

Though it is essential that reasonableness should characterize all exercise of the police power, both as to the subjects to be regulated and the character of the regulation,<sup>20</sup> fair doubts as to the reasonableness of a regulation should in all cases be resolved in favor of the legislative authority, whenever it shall have been asserted.<sup>21</sup>

#### *Same—Territorial Limitations*

The corporation boundaries usually mark the limit for the exercise of the police power by the municipality;<sup>22</sup> but in

<sup>18</sup> COOMBS v. MacDONALD, 43 Neb. 632, 62 N. W. 41, Cooley, Cas. Mun. Corp. 231; California Reduction Co. v. Sanitary Reduction Works of San Francisco, 126 Fed. 29, 61 C. C. A. 91, affirmed in 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204; Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676; Hopper v. Stack, 69 N. J. Law, 562, 56 Atl. 1; People ex rel. Tyroler v. Warden of City Prison of New York, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 768; Young v. Commonwealth, 101 Va. 853, 45 S. E. 327.

<sup>19</sup> California Reduction Co. v. Sanitary Reduction Works of San Francisco, 126 Fed. 29, 61 C. C. A. 91, affirmed in 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204.

<sup>20</sup> State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; City of Richmond v. Southern Bell Telephone & Telegraph Co., 85 Fed. 19, 28 C. C. A. 659; CITY OF CHICAGO v. GUNNING SYSTEM, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, Cooley, Cas. Mun. Corp. 129; City of Lamar v. Weidman, 57 Mo. App. 507.

<sup>21</sup> State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; City of Madisonville, for use of Commonwealth, v. Price, 123 Ky. 163, 94 S. W. 32, 13 Ann. Cas. 489.

<sup>22</sup> Gass v. Corporation of Greeneville, 36 Tenn. (4 Snead) 62.

many instances, for the preservation of the public health especially, the municipality is granted police power beyond its boundaries.<sup>23</sup> Thus, it has been held that the grant of power to acquire territory for a water supply beyond the limits of the municipality is within the competency of the Legislature,<sup>24</sup> and that the municipality may exercise police power in the protection of the territory thus acquired to insure cleanliness, and prevent any business and conduct likely to corrupt the fountain of water supply for the city.<sup>25</sup> So, likewise, to acquire outside territory for sewerage purposes, and to exercise police power over the same;<sup>26</sup> also to establish quarantine beyond the municipal boundaries and thus protect the citizens from epidemic of any contagious or infectious disease;<sup>27</sup> also to locate and regulate houses of detention and hospitals for infectious and contagious diseases beyond the city limits.<sup>28</sup>

<sup>23</sup> Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221, 30 Am. Rep. 545.

<sup>24</sup> City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Mayor, etc., of City of New York v. Bailey, 2 Denio (N. Y.) 433; Mayor, etc., of City of Rome v. Cabot, 28 Ga. 50; Martin v. Gleason, 139 Mass. 183, 29 N. E. 664; People ex rel. Green v. McClintonck, 45 Cal. 11.

But a municipality which buys a piece of land on a private stream, outside the corporate limits, does not thereby acquire the right to appropriate the water of the stream. Sparks Mfg. Co. v. Town of Newton, 60 N. J. Eq. 399, 45 Atl. 596; Ingersoll v. Town of Newton, 60 N. J. Eq. 399, 45 Atl. 596.

<sup>25</sup> Dunham v. City of New Britain, 55 Conn. 378, 11 Atl. 354; People v. Borda, 105 Cal. 636, 38 Pac. 1110; City of Coldwater v. Tucker, supra.

<sup>26</sup> City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601.

<sup>27</sup> Harrison v. Mayor, etc., of City of Baltimore, 1 Gill (Md.) 264; City of Anderson v. O'Conner, 98 Ind. 168; Thomas v. Town of Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525.

<sup>28</sup> Aull v. City of Lexington, 18 Mo. 401; Hutton v. City of Camden, 39 N. J. Law, 122, 23 Am. Rep. 203; City of Anderson v. O'Conner, 98 Ind. 168; Hazen v. Strong, 2 Vt. 427.

## EXERCISE OF POWER

96. The police power delegated to the municipality may be exercised either in the ordinary or in a summary manner.

The ordinary method of exercise of the police power is by the enactment of ordinances and their enforcement by due process of law. Ordinances passed in the exercise of the police power must possess the requisites of valid ordinances heretofore enumerated.<sup>29</sup> As already pointed out, such ordinances must be reasonable.<sup>30</sup> They must, too, be definite and certain,<sup>31</sup> and must be general and uniform in their operation.<sup>32</sup>

The summary method is that permitted to be used only in cases of emergency, when it becomes necessary to destroy individual property, or even take individual life, as the only apparent means of protecting the public and preventing still greater calamity. The municipality may lawfully employ through its police officers just so much force as is necessary to disperse a mob or quell a riot, even to the extent of maiming or killing persons engaged in the mob or riot,<sup>33</sup> provided such an extreme measure is necessary for the protection of the public; and in case of great conflagration in a city, which cannot otherwise be stopped, the municipality, through its proper

<sup>29</sup> See ante, § 51.

<sup>30</sup> See ante, § 51, p. 179.

<sup>31</sup> Village of Hampton v. Chicago, M. & St. P. Ry. Co., 118 Ill. App. 621; State v. Forman, 50 La. Ann. 1022, 24 South. 603; City of St. Louis v. Regina Flour Mill Co., 141 Mo. 389, 42 S. W. 1148; Board of Health of Borough of Glen Ridge v. Werner, 67 N. J. Law, 103, 50 Atl. 585; State v. Irvin, 126 N. C. 989, 35 S. E. 430.

<sup>32</sup> Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618; City of Shreveport v. Robinson, 51 La. Ann. 1314, 26 South. 277; State v. Elofson, 86 Minn. 103, 90 N. W. 309; Tugman v. City of Chicago, 78 Ill. 405; City of Shreveport v. Levy, 26 La. Ann. 671, 21 Am. Rep. 553.

<sup>33</sup> Stewart v. City of New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218; Dargan v. Mayor, etc., of City of Mobile, 31 Ala. 469, 70 Am. Dec. 505.

authorities, may lawfully, and with impunity, tear down or blow up buildings owned by private citizens, in order to arrest the progress of the flames.<sup>84</sup>

#### *License*

This power is also exercised by requiring municipal license for engaging in certain occupations, not as a means of revenue, but for the protection of the public.<sup>85</sup> Licenses are often granted by the municipality under state authority for the purpose of raising municipal revenue. When revenue is the purpose, then the municipality, within the limit allowed by law, exercises discretion as to the amount of tax to be paid by the licensee. When the license is required, however, in the exercise of a police power, then only such charge therefor may be made as fairly represents the expense incident to the exercise of the power.<sup>86</sup> Whether the license is for police or revenue, if not shown in the ordinance requiring it, will appear from the construction of the municipal charter.

<sup>84</sup> Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Taylor v. Inhabitants of Plymouth, 49 Mass. (8 Metc.) 462; Conwell v. Emrie, 2 Ind. 35; Fields v. Stokley, 99 Pa. 306, 44 Am. Rep. 109; Correas v. City of San Francisco, 1 Cal. 452; Dunbar v. Alcalde Ayuntamiento of San Francisco, 1 Cal. 355; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Field v. City of Des Moines, 39 Iowa, 575, 28 Am. Rep. 46; Keller v. City of Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; 2 Kent, "Comm." 339.

<sup>85</sup> Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383; Ft. Smith v. Ayers, 43 Ark. 82; Ward v. Washington, 4 Cranch, C. C. 232, Fed. Cas. No. 17,163; Barthet v. City of New Orleans (C. C.) 24 Fed. 563; Carroll v. Mayor, etc., of City of Tuscaloosa, 12 Ala. 173.

<sup>86</sup> Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; Welch v. Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383; City of Boston v. Schaffer, 9 Pick. (Mass.) 415.

An ordinance imposing a license duty upon city cars for revenue purposes only is not an ordinance for police and internal government. Mayor, etc., of City of New York v. Second Ave. R. Co., 32 N. Y. 261. See, also, Johnson v. City of Philadelphia, 60 Pa. 445; Hodges v. Mayor, etc., of Town of Nashville, 2 Humph. (Tenn.) 61 (control of theaters).

## DOUBLE POLICE POWER

97. The Legislature may confer police power upon a municipality over subjects within the provisions of existing state laws.

The general laws of the state apply as well to municipal corporations as to outside territory, and there is special necessity for the exercise of the police power in urban communities. Jurisdiction to enforce these state laws is often conferred upon the municipal courts; yet none of these things prevents the state from conferring police power upon municipalities over the same subject-matter.<sup>37</sup> But it has been held that police power in such cases is not inherent in a municipal corporation; nor can it be implied, but must be expressly conferred.<sup>38</sup> Other cases favor the implication of police power in the municipality where the offense does not vitally affect the public interests, but specially concerns the municipal welfare.<sup>39</sup> Moreover, as we have heretofore seen,<sup>40</sup> a majority of the states permit the enforcement of both state and municipal penalties for the same unlawful act, as being not only against the peace and dignity of the state, but also against the municipal welfare.<sup>41</sup>

<sup>37</sup> State v. Ludwig, 21 Minn. 202; City of Brooklyn v. Toynbee, 31 Barb. (N. Y.) 282; State v. Quong, 8 Idaho, 191, 67 Pac. 491; Town of Rosedale v. Hanner, 157 Ind. 390, 61 N. E. 792; Cooley, Const. Lim. (6th Ed.) 239.

<sup>38</sup> City of Frankfort v. Aughe, 114 Ind. 77, 15 N. E. 802; Id., 114 Ind. 600, 15 N. E. 804; Ex parte Bourgeois, 60 Miss. 663, 45 Am. Rep. 420; Loeb v. City of Attica, 82 Ind. 175, 42 Am. Rep. 494; State v. Langston, 88 N. C. 692; Mayor, etc., of City of Mobile v. Allaire, 14 Ala. 400.

<sup>39</sup> Town of Bloomfield v. Trimble, 54 Iowa, 399, 6 N. W. 586, 37 Am. Rep. 212; Barter v. Commonwealth, 3 Pen. & W. (Pa.) 253; Davis v. Town of Anita, 73 Iowa, 325, 35 N. W. 244; City of Amboy v. Sleeper, 31 Ill. 499. See Carey v. Washington, 5 Cranch, C. C. 13, Fed. Cas. No. 2,404; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 89.

<sup>40</sup> Ante, § 53.

<sup>41</sup> State v. Flint, 63 Conn. 248, 28 Atl. 28; Hankins v. People, 106

**PEACE AND ORDER****98. The preservation of the public peace and order is the primary police function of a municipality.**

Whatever contention may have arisen over municipal police power, the authority to preserve the peace and order of the municipality, to prevent the exercise of unlawful violence, and to compel citizens and sojourners to abstain from riot, rout, and unlawful assembly has never been seriously questioned. It is regarded as an inherent municipal power essential to municipal life; and so, whenever the authority has been mooted, it has been uniformly sustained, in some cases even to the extent of the doubtful power of double punishment.<sup>42</sup> For even those decisions which hold such double punishment to be violative of constitutional provision are not based upon the want of municipal authority, but upon the positive prohibition against putting a person twice in jeopardy.<sup>43</sup> Municipal regulations preservative of peace and order do not assume to punish crime against the state, but are confined to small offenses and lighter demonstrations of violence and disorder tending to crime. They are essentially means for the prevention of crime as well as the preservation

Ill. 628; Williams v. City of Warsaw, 60 Ind. 457; Rogers v. Jones, 1 Wend. (N. Y.) 261, 19 Am. Dec. 493; Greenwood v. State, 6 Baxt. (Tenn.) 567, 32 Am. Rep. 539; City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791; People v. Bay City, 36 Mich. 186; City of Lebanon v. Gordon, 99 Mo. App. 277, 73 S. W. 222; State v. Muir, 86 Mo. App. 642; Id., 164 Mo. 610, 65 S. W. 285. See Taylor v. Sandersville, 118 Ga. 63, 44 S. E. 845.

<sup>42</sup> City of Carlisle v. Heckinger, 103 Ky. 381, 45 S. W. 358; City of Talladega v. Fitzpatrick, 133 Ala. 613, 32 South. 252; Bowles v. District of Columbia, 22 App. D. C. 321; Kansas City v. Hallett, 59 Mo. App. 160; cases supra, note 41. But see Ex parte Cross, 44 Tex. Cr. R. 376, 71 S. W. 289.

<sup>43</sup> Ex parte Bourgeois, 60 Miss. 663, 45 Am. Rep. 420; State v. Keith, 94 N. C. 933; Moran v. City of Atlanta, 102 Ga. 840, 30 S. E. 298; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

of peace and order,<sup>44</sup> and are therefore favored by the courts as wise provisions for increasing civilization. Such regulations are indispensable to municipalities in those states which, as a measure of public policy, declare public corporations responsible for the public peace and preservation of private property, and make them absolutely liable for damages done by a mob within the corporate boundaries.<sup>45</sup>

### SANITATION

99. The preservation of the health of the population is uniformly recognized as a most important municipal function; and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality.

Congested populations tend to breed disease as well as disorder, and since health as well as order is an essential condition of good living, and one of the primary purposes of

<sup>44</sup> Jefferson City v. Courtmire, 9 Mo. 692; Vason v. City of Augusta, 38 Ga. 542; Town of Washington v. Hammond, 76 N. C. 33; City of New Orleans v. Miller, 7 La. Ann. 651.

A charter right of control over highways, streets, alleys, and public grounds authorizes an ordinance forbidding the making of any public address in a public place without first obtaining permission from the mayor. Love v. Judge of Recorder's Court of Detroit, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618. See Lincoln v. City of Boston, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; CITY OF CHARITON v. SIMMONS, 87 Iowa, 226, 54 N. W. 146, Cooley, Cas. Mun. Corp. 232; Brooklyn Park Com'r's v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; City of Wilkes-Barre v. Garebed, 9 Kulp (Pa.) 273; City of Grand Rapids v. Newton, 111 Mich. 48, 69 N. W. 84, 35 L. R. A. 226, 66 Am. St. Rep. 387.

<sup>45</sup> Darlington v. Mayor, etc., of City of New York, 31 N. Y. 164, 88 Am. Dec. 248; Campbell's Adm'x v. City Council of Montgomery, 53 Ala. 527, 25 Am. Rep. 656. Municipalities are liable for whatever damages may be caused by mobs or riotous assemblages within their respective limits. Street v. City of New Orleans, 32 La. Ann. 577. But this is not so at common law. Mayor, etc., of Baltimore v. Poultney, 25 Md. 107; Prather v. City of Lexington, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585.

municipal incorporation, sanitary powers may not only be expressly conferred by the charter, or implied therefrom, but they have been judicially declared to be inherent in a municipality as a necessary attribute thereof,<sup>46</sup> and have been exercised in ways innumerable. These powers are favored in American courts, and it has been accordingly held that, since a supply of wholesome water is necessary to the comfort and well-being of a city,<sup>47</sup> a municipal contract for the boring of an artesian well is an exercise of the police power. And so, likewise, the city may make such regulations as will insure pure milk,<sup>48</sup> or prevent the spread of a deadly disease in a fruit-producing tree.<sup>49</sup> So, also, it may regulate the cultivation of crops, such as rice, within the corporate limits,<sup>50</sup> the cleaning and care of sinks and cesspools,<sup>51</sup> burial of the dead,<sup>52</sup> and the location and operation of slaughter houses.<sup>53</sup>

<sup>46</sup> Appeal of Borough of Butler (Pa.) 1 Atl. 604; Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; Gundling v. City of Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; Manning v. Bruce, 186 Mass. 282, 71 N. E. 537; Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

<sup>47</sup> Kennedy v. Phelps, 10 La. Ann. 227; Town of Suffield v. Hathaway, 44 Conn. 521, 26 Am. Rep. 483; Smith v. City of Nashville, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

<sup>48</sup> State v. Dupaquier, 46 La. Ann. 577, 15 South. 502, 26 L. R. A. 162, 49 Am. St. Rep. 334; People ex rel. Lieberman v. Vandecarr, 81 App. Div. 128, 80 N. Y. Supp. 1108, Id., 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781.

<sup>49</sup> Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251. Cf. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

<sup>50</sup> Town Council of Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L. R. A. 854, 26 Am. St. Rep. 659; Green v. Mayor, etc., of City of Savannah, 6 Ga. 1.

<sup>51</sup> Commonwealth v. Cutter, 156 Mass. 52, 29 N. E. 1146; Nicoulin v. Lowery, 49 N. J. Law, 391, 8 Atl. 513.

<sup>52</sup> Graves v. City of Bloomington, 17 Ill. App. 476; City of Austin v. Austin City Cemetery Association, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; Coates v. New York City, 7 Cow. (N. Y.) 586; In re Bohem, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618.

<sup>53</sup> Ex parte Heilbron, 65 Cal. 609, 4 Pac. 648; Beiling v. City of Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; Huesing v.

It is competent also for a city to establish quarantine regulations,<sup>54</sup> pesthouses, and places of detention,<sup>55</sup> and to exclude, remove, or detain persons affected with, or who have been exposed to, contagious or infectious diseases.<sup>56</sup> It may regulate also the removal of dead animals and garbage,<sup>57</sup> and compel citizens to prepare the same for removal at minimum expense;<sup>58</sup> and generally may suppress nuisance to the public health.<sup>59</sup>

*City of Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

<sup>54</sup> *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

<sup>55</sup> *Elliott v. Kalkaska Supervisors*, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706; *City of Clinton v. Clinton Co.*, 61 Iowa, 205, 16 N. W. 87.

<sup>56</sup> *Harrison v. Mayor, etc., of City of Baltimore*, 1 Gill (Md.) 264; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525; *City of Chicago v. Peck*, 98 Ill. App. 434; *Id.*, 196 Ill. 260, 63 N. E. 711; *Frazer v. City of Chicago*, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 306, 78 Am. St. Rep. 296; *City of Anderson v. O'Conner*, 98 Ind. 168.

<sup>57</sup> *Ex parte Casinello*, 62 Cal. 538; *In re Vandine*, 6 Pick. (Mass.) 187, 17 Am. Dec. 351; *Iler v. Ross*, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676; *Alpers v. City and County of San Francisco* (C. C.) 32 Fed. 503; *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *Smiley v. MacDonald*, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 684; *Schoen v. City of Atlanta*, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804; *Balch v. City of Utica*, 42 App. Div. 562, 59 N. Y. Supp. 513.

<sup>58</sup> *City of Grand Rapids v. De Vries*, *supra*; *Sanitary Reduction Works of San Francisco v. California Reduction Co.* (C. C.) 94 Fed. 693.

<sup>59</sup> *Baker v. City of Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; *Hellen v. Noe*, 25 N. C. 493; *Ferguson v. City of Selma*, 43 Ala. 398; *Harvey v. Dewoody*, 18 Ark. 252; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251; *Kennedy v. Phelps*, 10 La. Ann. 227; *Smith v. Collier*, 118 Ga. 306, 45 S. E. 417; *Municipality No. 1 v. Wilson*, 5 La. Ann. 747; *Lake v. City of Aberdeen*, 57 Miss. 260; *Vason v. City of Augusta*, 38 Ga. 542; *Dunham v. City of New Britain*, 55 Conn. 378, 11 Atl. 354.

*Nuisances*

It is primarily within the power of a municipality to determine and declare what is a nuisance to health;<sup>60</sup> and the courts will not interfere with this discretion except in case of obvious abuse.<sup>61</sup> But whether a given thing is a nuisance is a question of fact, and it is not within the power of a municipal corporation arbitrarily and without support of reason or fact to declare that which is harmless a nuisance.<sup>62</sup> A corporation cannot make a thing a nuisance by declaring it so.<sup>63</sup> "This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities."<sup>64</sup> The power to regulate does not

<sup>60</sup> LAUGEL v. CITY OF BUSHNELL, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266, Cooley, Cas. Mun. Corp. 235; Hart v. Mayor, etc., of City of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Harrison v. Mayor, etc., of City of Baltimore, 1 Gill (Md.) 264.

<sup>61</sup> Baker v. City of Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; LAUGEL v. CITY OF BUSHNELL, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266, Cooley, Cas. Mun. Corp. 235.

<sup>62</sup> Block v. President, etc., of Town of Jacksonville, 36 Ill. 301; In re Hong Wah (D. C.) 82 Fed. 623; City of Evansville v. Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; State ex rel. City of Indianapolis v. Indianapolis Union R. Co., 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831; City of St. Louis v. Regina Flour Mill Co., 141 Mo. 389, 42 S. W. 1148; Nazworthy v. City of Sullivan, 55 Ill. App. 48; Everett v. City of Council Bluffs, 46 Iowa, 66; Tissot v. Great Southern Telegraph & Telephone Co., 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248.

<sup>63</sup> Ward v. City of Little Rock, 41 Ark. 526, 45 Am. Rep. 46; Harmon v. City of Chicago, 110 Ill. 400, 51 Am. Rep. 698; State v. Mott, 61 Md. 297, 48 Am. Rep. 105; Ex parte O'Leary, 65 Miss. 80, 3 South. 144, 7 Am. St. Rep. 640; Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. See City of Pittsburg v. W. H. Keech Co., 21 Pa. Super. Ct. 548, where it was held that declaring the thing prohibited a public nuisance would be no ground for denying validity to the penal provision of the ordinance.

An ordinance which declares that a nuisance which is not a nuisance is unreasonable and void. Munsell v. City of Carthage, 105 Ill. App. 119; City of Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; City of Carthage v. Duval, 105 Ill. App. 123. See, also, Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684.

<sup>64</sup> Miller, J., in Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984.

give power to prohibit;<sup>65</sup> and therefore a city may not absolutely forbid the sale of meat or secondhand clothing, or other lawful business not in itself necessarily a nuisance.<sup>66</sup> Ordinarily, the municipality must resort to the usual process of law to abate a health nuisance;<sup>67</sup> but the state may confer upon it the power of summary abatement in case of emergency.<sup>68</sup>

## SAFETY

**100. The safety of life, limb and property being one of the prime objects of municipal incorporation, all appropriate regulations tending to promote this object are within the police power delegated to a municipality.**

Health, good order, and safety being prime objects of civilization are the essential conditions of municipal life. It would be vain and useless to have good order and health in a city without security to person and property. Municipal corporations are therefore authorized in the exercise of police power to enact such ordinances and employ such necessary means as will insure safety to the private property as well as the persons of its citizens.<sup>69</sup> Fire has been recognized as

<sup>65</sup> State v. Taft, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. Rep. 768.

<sup>66</sup> Shiras v. Olinger, 50 Iowa, 571, 32 Am. Rep. 138; In re Hong Wah (D. C.) 82 Fed. 623; Pickard v. Collins, 23 Barb. (N. Y.) 444; Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665; Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; Town of Crowley v. West, 52 La. Ann. 526, 27 South. 53, 47 L. R. A. 652, 78 Am. St. Rep. 355; Harrison v. Brooks, 20 Ga. 537.

<sup>67</sup> Clark v. Mayor, etc., of City of Syracuse, 13 Barb. (N. Y.) 32; City of Ottumwa v. Chinn, 75 Iowa, 405, 39 N. W. 670; Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106.

<sup>68</sup> Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; Sprigg v. Town of Garrett Park, 89 Md. 406, 43 Atl. 813; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89.

<sup>69</sup> Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 266; City

the greatest municipal peril, and measures to prevent the rise and spread of conflagrations are universal.

#### *Fire Limits*

A city may therefore prescribe fire limits, and forbid the erection of wooden buildings therein.<sup>70</sup> Most of the cases hold such power to be inherent in the corporation,<sup>71</sup> but some

of *Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 71 N. J. Law, 75, 58 Atl. 343; 2 Bac. Abr. 147; 2 Kent, Comm. 339.

A city has been held to have the right of legal exercise of the police power to require a railroad company to raise its tracks so as to do away with grade crossings. *Osburn v. Chicago*, 105 Ill. App. 217. And a city may compel persons owning or having charge of property, in front of which is a sidewalk unsafe by reason of ice or snow, to make the walk safe by removal of the snow, or covering the ice with sand, within a reasonable time. *State v. McMahon*, 76 Conn. 97, 55 Atl. 591. See, also, *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718 (right to regulate handling of naphtha, benzine, turpentine, coal oil, etc.); *City of Centralia v. Smith*, 103 Mo. App. 438, 77 S. W. 488 (right to prohibit firecrackers); *People ex rel. Maynard v. Village of Holly*, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677, 75 Am. St. Rep. 435 (right to offer reward for conviction of incendiaries).

<sup>70</sup> *Knoxville Corp. v. Bird*, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; *Patterson v. Johnson*, 214 Ill. 481, 73 N. E. 761; *First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185; *State v. O'Neil*, 49 La. Ann. 1171, 22 South. 352; *City of Troy v. Winters*, 4 Thomp. & C. (N. Y.) 256; *STATE v. JOHNSON*, 114 N. C. 846, 19 S. E. 599, *Cooley, Cas. Mun. Corp.* 239; *Hine v. City of New Haven*, 40 Conn. 478; *State v. O'Neil*, 49 La. Ann. 1171, 22 South. 352; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180; *Id. (Ind.)* 26 N. E. 184; *McCloskey v. Kreling*, 76 Cal. 511, 18 Pac. 433; *Eureka City v. Wilson*, 15 Utah, 67, 48 Pac. 150, 62 Am. St. Rep. 904; *Chimene v. Baker*, 32 Tex. Civ. App. 520, 75 S. W. 330; *City of Roanoke v. Bolling*, 101 Va. 182, 43 S. E. 343; *Ford v. Thralkill*, 84 Ga. 189, 10 S. E. 600.

<sup>71</sup> *Mayor, etc., of City of Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *Klingler v. Bickel*, 117 Pa. 326, 11 Atl. 555; *Commonwealth v. Tewksbury*, 11 Metc. (Mass.) 55; *Eichenlaub v. City of St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; *City of Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *Clark v. City of South Bend*, 85 Ind. 276, 44 Am. Rep. 13.

hold that it must be expressly conferred.<sup>72</sup> A fire-limit ordinance will prevent the construction of wooden buildings previously projected and contracted for,<sup>73</sup> and it has been held that a wooden building erected in violation thereof may be summarily removed.<sup>74</sup> The decisions with regard to raising or repairing wooden buildings within fire limits are not harmonious; but the weight of authority seems to be that any enlarging or changing of a building or re-erection of one destroyed by fire, or removal, whether from without or within the fire limits, is an erection within the meaning of such ordinance, and is unlawful.<sup>75</sup> A city may also pass ordinances prescribing the maximum quantity of gunpowder, dynamite, nitroglycerin, hay, excelsior, or other combustible or inflammable material which may be stored in one place or kept in

<sup>72</sup> *City of Keokuk v. Scroggs*, 39 Iowa, 447; *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *City of Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. 136, 56 Am. Rep. 341; *Pratt v. Borough of Litchfield*, 62 Conn. 112, 25 Atl. 461.

<sup>73</sup> *Knoxville Corp. v. Bird*, 12 Lea (Tenn.) 121, 49 Am. Rep. 326; *City of Salem v. Maynes*, 123 Mass. 372.

<sup>74</sup> *McKibbin v. Town of Ft. Smith*, 35 Ark. 352; *First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185; *Micks v. Mason*, 145 Mich. 212, 108 N. W. 707, 11 L. R. A. (N. S.) 653, 9 Ann. Cas. 291; *Mayor, etc., of City of Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *Klingler v. Bickel*, 117 Pa. 326, 11 Atl. 555; *Hine v. City of New Haven*, 40 Conn. 478.

But an owner is entitled to a reasonable time in which to erect the kind of building required by the ordinance. *Lemmon v. Town of Guthrie Center*, 113 Iowa, 36, 84 N. W. 986, 86 Am. St. Rep. 361.

See, also, *Griffin v. City of Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684; *Ward v. City of Murphysboro*, 77 Ill. App. 549.

<sup>75</sup> *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *Eureka City v. Wilson*, 15 Utah, 67, 48 Pac. 150, 62 Am. St. Rep. 904; *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Griffin v. City of Gloversville*, supra. As to repairs, see *O'Brien v. Louer*, 158 Ind. 211, 61 N. E. 1004.

Contra, *Contas v. Bradford*, 206 Pa. 291, 55 Atl. 989; *Brown v. Hunn*, 27 Conn. 334, 71 Am. Dec. 71; *Borough of Stamford v. Studwell*, 60 Conn. 85, 21 Atl. 101.

one house in the city.<sup>76</sup> It may also prescribe and enforce the construction of fire escapes on all buildings not strictly private.<sup>77</sup> Ordinances may also be enacted prescribing safe chimneys, flues, and furnaces,<sup>78</sup> and regulating the handling of coals, ashes, and the like;<sup>79</sup> and, indeed, any other reasonable regulation to prevent and extinguish fires.

#### *Fire Apparatus*

Express authority is usually conferred by charter for the organization of a fire department and the purchase of the necessary fire engines, hose carts, hook and ladder wagons, and other appropriate apparatus for extinguishing fires and maintaining the department. But it has been held that such power is inherent, or at least may be implied, and that the corporation may lawfully appropriate money for these purposes without express authority.<sup>80</sup>

<sup>76</sup> Wright v. Chicago & N. W. Ry. Co., 27 Ill. App. 200 (petroleum); City Council of Charleston v. Elford, 1 McMul. (S. C.) 234; Clark v. City of South Bend, 85 Ind. 276, 44 Am. Rep. 13; Davenport v. Richmond City, 81 Va. 636, 59 Am. Rep. 694.

In Dobbins v. Los Angeles, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95, an ordinance making it unlawful to erect or maintain any works for the manufacture of gas within certain limits was held to be a legitimate exercise of the police power of the city.

<sup>77</sup> Commonwealth v. Emsley, 5 Pa. Co. Ct. R. 476; City of Seattle v. Hinckley, 40 Wash. 468, 82 Pac. 747, 2 L. R. A. (N. S.) 398; Fire Department of New York v. Chapman, 10 Daly (N. Y.) 377; McCulloch v. Ayer (C. C.) 96 Fed. 178; City of New Orleans v. Danneman, 51 La. Ann. 1093, 25 South. 931; Fire Department of City of New York v. Sturtevant, 33 Hun (N. Y.) 407; Schmalzried v. White, 97 Tenn. 37, 36 S. W. 393, 32 L. R. A. 782. See De Ginther v. New Jersey Home for the Education and Care of Feeble-Minded Children, 58 N. J. Law, 354, 33 Atl. 968.

<sup>78</sup> Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 266; Hennessy v. City of St. Paul (C. C.) 37 Fed. 565; City Council of Charleston v. Blake, 12 Rich. (S. C.) 66; Same v. Palmer, 1 McCord (S. C.) 342.

<sup>79</sup> Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676; Inhabitants of Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; 1 Dill. Mun. Corp. § 143.

<sup>80</sup> Corporation of Bluffton v. Studabaker, 106 Ind. 129, 6 N. E. 1; GREEN v. CITY OF CAPE MAY, 41 N. J. Law, 45, Cooley, Cas. Mun. Corp. 99; Allen v. Inhabitants of Taunton, 19 Pick. (Mass.) 485.

*Stopping Conflagration*

The supreme exercise of police power by a municipality for public safety is displayed in razing, in case of emergency, valuable private property to prevent the spread of conflagration.<sup>81</sup> This may be done without incurring any liability whatever to the owner, unless compensation has been provided by statute; the rule at common law being that the state might destroy, though it could not take private property without compensation.<sup>82</sup>

*Speed Regulations*

Another source of danger to public safety in a city is rapid locomotion in or across the streets thereof. Municipalities have authority to regulate the movement not only of railroad trains, street cars, omnibuses, hacks, automobiles,<sup>83</sup> but also individuals moving on horseback, bicycles, and other vehicles,<sup>84</sup> and likewise to regulate the movement of water craft

<sup>81</sup> Smith v. City of Rochester, 76 N. Y. 506; Taylor v. Inhabitants of Plymouth, 49 Mass. (8 Metc.) 462; City of Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Dunbar v. City Council of Augusta, 90 Ga. 390, 17 S. E. 907.

<sup>82</sup> Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; White v. City Council of Charleston, 2 Hill (S. C.) 571; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980.

<sup>83</sup> United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081; City of Chicago v. Banker, 112 Ill. App. 94; COMMONWEALTH v. CROWNINSHIELD, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245; Cooley, Cas. Mun. Corp. 242; Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457; Haas v. Chicago & N. W. Ry. Co., 41 Wis. 44; City of Lake View v. Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435; Whitson v. City of Franklin, 34 Ind. 392; City of Buffalo v. New York, L. E. & W. R. Co., 152 N. Y. 276, 46 N. E. 496.

But an ordinance prohibiting driving on the streets at a rate greater than six miles an hour is, as to members of the fire department, invalid. State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305; City of Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Kahn v. Eisler, 22 Misc. Rep. 350, 49 N. Y. Supp. 135.

<sup>84</sup> Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308;

in the waters over which they have jurisdiction.<sup>85</sup> Municipal ordinances have been sustained which restrict the running of trains within corporate limits to four miles an hour,<sup>86</sup> require flagmen to be kept at street crossings,<sup>87</sup> and those requiring a conductor on each street car,<sup>88</sup> and many similar ordinances regulating speed and movements within the municipal jurisdiction whereby collisions may be avoided and human life and property saved from needless injury or reckless destruction.<sup>89</sup>

### *Dangerous Forces*

Municipal corporations also exercise the police power in the supervision and regulation of occupations which are essentially dangerous in their nature or conduct, and sometimes entirely exclude them from the municipal limits.<sup>90</sup> To this class belong those occupations which produce, transmit, or require great power, or expose to special danger,<sup>91</sup> such as steam engines, electric plants, elevators, and the like, over

Commonwealth v. Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; Nealis v. Hayward, 48 Ind. 19; Washington v. Mayor, etc., of City of Nashville, 1 Swan (Tenn.) 177.

<sup>85</sup> Backus v. Detroit, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447.

<sup>86</sup> KNOBLOCH v. CHICAGO, M. & ST. P. RY. CO., 31 Minn. 402, 18 N. W. 106, Cooley, Cas. Mun. Corp. 245.

<sup>87</sup> Toledo, W. & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611. And to erect safety gates at certain street crossings. Chesapeake & O. Ry. Co. v. Maysville, 69 S. W. 728, 24 Ky. Law Rep. 615.

<sup>88</sup> South Covington & C. St. Ry. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 13 Ky. Law Rep. 943, 15 L. R. A. 604, 40 Am. St. Rep. 161.

<sup>89</sup> Commonwealth v. Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; Buffalo & N. F. R. Co. v. City of Buffalo, 5 Hill (N. Y.) 209; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734; Hayes v. Michigan C. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

<sup>90</sup> Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734; Mayor, etc., of City of New York v. Ordrenan, 12 Johns. (N. Y.) 122.

<sup>91</sup> Davenport v. Richmond City, 81 Va. 636, 59 Am. Rep. 694; Stanley v. City of Davenport, 54 Iowa, 463, 2 N. W. 1064, 37 Am. Rep. 216.

But see Richmond Safety Gate Co. v. Ashbridge (C. C.) 116 Fed. 220.

which the municipality usually exercises supervision by inspection or license.<sup>92</sup>

## COMFORT

101. The public comfort and convenience is also one of the objects of municipal incorporation, and is protected by the exercise of the police power.

This exercise of the police power finds expression in the Blackstone definition that "individuals are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent and inoffensive." Whatever, therefore, causes public discomfort or inconvenience or immorality may be prevented in the exercise of the police power.<sup>93</sup> This includes not only conduct and acts recognized by the common law as essentially evil—*mala in se* or *mala prohibita*—but even things not unlawful, which cause the public hurt, damage, or harm, and thus become nuisances.<sup>94</sup>

<sup>92</sup> City of St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474.

But where the business is subjected to inspection, the cost of the same must not be unreasonable. City of Saginaw v. Swift Electric Light Co., 113 Mich. 660, 72 N. W. 6; City of Joplin v. Leckie, 78 Mo. App. 8. See City of Cape May v. Cape May Transportation Co., 64 N. J. Law, 80, 44 Atl. 948.

<sup>93</sup> Whitmier & Filbrick Co. v. City of Buffalo (C. C.) 118 Fed. 773 (bill board). Imposing a penalty upon a manufacturer for not so constructing the furnaces as to consume the smoke is a proper exercise of the police power. Department of Health of City of New York v. Ebling Brewing Co. (Mun. Ct.) 78 N. Y. Supp. 11; City of St. Paul v. Haugbro, 93 Minn. 59, 100 N. W. 470, 66 L. R. A. 441, 106 Am. St. Rep. 427, 2 Ann. Cas. 580.

Under an investiture in municipal corporations of power to prevent annoyance within their limits, to abate nuisance, and to enact ordinances to carry into effect such power, the enactment of an ordinance prohibiting the keeping of a jackass within its limits, in hearing distance of its populace, and declaring such keeping to be a nuisance, was held to be a valid exercise of the police power. Ex parte Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63.

<sup>94</sup> Hart v. Mayor, etc., of City of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec. 465; Hel-

It has accordingly been held that a city may prohibit public profanity,<sup>95</sup> street preaching,<sup>96</sup> public drunkenness,<sup>97</sup> carrying concealed weapons,<sup>98</sup> rock blasting,<sup>99</sup> vagrancy,<sup>1</sup> cruelty to animals,<sup>2</sup> Sabbath breaking,<sup>3</sup> destruction of public trees,<sup>4</sup> steam whistle blowing,<sup>5</sup> and the running at large of animals.<sup>6</sup>

len v. Noe, 25 N. C. 493; Baker v. City of Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; Kennedy v. Phelps, 10 La. Ann. 227; City of Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; Parker v. Mayor, etc., of City of Macon, 39 Ga. 725, 99 Am. Dec. 486; Ferguson v. City of Selma, 43 Ala. 398.

<sup>95</sup> State v. Cainan, 94 N. C. 880; State v. Ernhardt, 107 N. C. 789, 12 S. E. 426; Ex parte Delaney, 48 Cal. 478.

<sup>96</sup> City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; City of Bloomington v. Richardson, 38 Ill. App. 60; Commonwealth v. Davis, 140 Mass. 485, 4 N. E. 577.

<sup>97</sup> Town of Bloomfield v. Trimble, 54 Iowa, 399, 6 N. W. 586, 37 Am. Rep. 212; Mayor, etc., of Town of Homer v. Blackburn, 27 La. Ann. 544. Cf. State v. Bruckhauser, 26 Minn. 301, 3 N. W. 695.

<sup>98</sup> Ex parte Cheney, 90 Cal. 617, 27 Pac. 436.

But in Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413, it was held that the carrying of concealed weapons did not amount to a breach of the peace, and could not be made an offense, and punishable by municipal ordinance, unless expressly authorized by municipal charter.

<sup>99</sup> Commonwealth v. Parks, 155 Mass. 531, 30 N. E. 174.

<sup>1</sup> City of St. Louis v. Bentz, 11 Mo. 61; Byers v. Commonwealth, 42 Pa. 89.

<sup>2</sup> City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791; Porter v. Vinzant, 49 Fla. 213, 38 South. 607, 111 Am. St. Rep. 93.

<sup>3</sup> City of Shreveport v. Levy, 26 La. Ann. 671, 21 Am. Rep. 553; Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; Mayor, etc., of City of Nashville v. Linck, 12 Lea (Tenn.) 499; City of Cincinnati v. Rice, 15 Ohio, 225; State v. Welch, 36 Conn. 215.

<sup>4</sup> State v. Merrill, 37 Me. 329.

<sup>5</sup> 1 Dill. Mun. Corp. § 374, note p. 448.

<sup>6</sup> Amyx v. Taber, 23 Cal. 370; Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201; Gibson v. Town of Harrison, 69 Ark. 385, 63 S. W. 999, 54 L. R. A. 268; Griggs v. City of Macon, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134; Comfort v. City of Kosciusko, 88 Miss. 611, 41 South. 268, 9 Ann. Cas. 178; Cochrane v. City of Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479; Hellen v. Noe, 25 N. C. 493; City of Chattanooga v. Norman, 92 Tenn. 73, 20 S. W. 417; Atkinson v. Mott, 102 Ind. 431, 26 N. E. 217; Irwin v. Mattox, 138 Pa. 466, 21 Atl. 209; Mayor, etc., of City of Hagerstown v. Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649.

Animals found running at large in a municipality may be impounded, and, after due time for redemption and notice to the owner, may be sold,<sup>7</sup> if not redeemed, unless a different penalty is provided, in which case only the penalty prescribed can be enforced.<sup>8</sup> And so, under authority to impose a fine only, the city cannot pass an ordinance authorizing that vagrant hogs be killed and appropriated by the officer.<sup>9</sup> A municipal corporation may, in the exercise of police power, require a license for the keeping of dogs; the same being held not unconstitutional for inequality of taxation or undue restriction upon the right to own property.<sup>10</sup>

<sup>7</sup> Brophy v. Hyatt, 10 Colo. 223, 15 Pac. 299; Gosselink v. Campbell, 4 Iowa, 296; Crum v. Bray, 121 Ga. 709, 49 S. E. 686, 1 Ann. Cas. 991; Gilchrist v. Schmidling, 12 Kan. 263; Hellen v. Noe, *supra*.

An ordinance providing that an animal found running at large within the city limits may be impounded and sold, and this though the owner is a nonresident of the city, is a valid exercise of the police power. Jeans v. Morrison, 99 Mo. App. 208, 73 S. W. 235. And it makes no difference whether the animals escape by reason of the owner's negligence or not. Dorton v. Burks, 99 Mo. App. 165, 73 S. W. 239. See, also, Thompson v. Millen, 74 S. W. 288, 24 Ky. Law Rep. 2479; McVey v. Barker, 92 Mo. App. 498; Folmar v. Curtis, 86 Ala. 354, 5 South. 678; McKee v. McKee, 8 B. Mon. (Ky.) 433; Roberts v. Ogle, *supra*; Horney v. Sloan, 1 Ind. 266; Gilmore v. Holt, 4 Pick. (Mass.) 258; Whitfield v. Longest, 28 N. C. 268.

<sup>8</sup> Mayor, etc., of City of Cartersville v. Lanham, 67 Ga. 753; Brophy v. Hyatt, *supra*.

<sup>9</sup> Donovan v. Mayor, etc., of City of Vicksburg, 29 Miss. 247, 64 Am. Dec. 143; Kennedy v. Sowden, 1 McMUL. (S. C.) 328, citing McRea v. Olain, an unreported case. And the owner of such hogs may be fined, whether he live inside or out of the city limits. Jones v. Duncan, 127 N. C. 118, 37 S. E. 135.

<sup>10</sup> Washington v. Lynch, 5 Cranch, C. C. 498, Fed. Cas. No. 17,231; City of Carthage v. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352; City of Faribault v. Wilson, 34 Minn. 254, 25 N. W. 449; Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; State v. City of Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; Griggs v. City of Macon, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134; Hill v. City Council of Abbeville, 59 S. C. 396, 38 S. E. 11.

## OCCUPATIONS AND AMUSEMENTS

102. The city possesses no power to prohibit a useful business or a harmless amusement; but all manner of occupations and amusements are subject to reasonable regulation by the state or the municipality exercising the delegated police power.

Occupations or amusements which are immoral, illegal, or harmful to the city, such as gambling, liquor selling, and the like, may be entirely prohibited;<sup>11</sup> but a municipality has no authority to interfere with private rights of lawful occupation and amusement beyond necessary regulation.<sup>12</sup> A city may prohibit the keeping of a house of ill fame,<sup>13</sup> or the leasing of property for that purpose;<sup>14</sup> and so, also, for gambling or liquor selling, if authorized by charter;<sup>15</sup> or, if these practices are not forbidden, the city may adopt and enforce stringent regulations for them. It may prohibit the sale of liquors and wines at places of musical or dramatic entertainment where females act as waiters,<sup>16</sup> and may fix hours for closing and opening saloons,<sup>17</sup> and forbid admission of minors

<sup>11</sup> Odell v. City of Atlanta, 97 Ga. 670, 25 S. E. 173.

<sup>12</sup> Muhlenbrinck v. Long Branch Com'rs, 42 N. J. Law, 364, 36 Am. Rep. 518; Dunham v. Trustees of Rochester, 5 Cow. (N. Y.) 462; City of Buffalo v. Collins Baking Co., 24 Misc. Rep. 745, 53 N. Y. Supp. 968; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; State v. Owen, 50 La. Ann. 1181, 24 South. 187.

<sup>13</sup> People v. Miller, 38 Hun (N. Y.) 82; State ex rel. Burton v. Williams, 11 S. C. 288; Childress v. Mayor, etc., of City of Nashville, 3 Sneed (Tenn.) 347; City of Shreveport v. Roos, 35 La. Ann. 1010. Cf. State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471.

<sup>14</sup> L'Hote v. City of New Orleans, 51 La. Ann. 93, 24 South. 608, 44 L. R. A. 90; McAlister v. Clark, 33 Conn. 91; Childress v. Mayor, etc., of City of Nashville, 3 Sneed (Tenn.) 347, 356.

Contra, State v. Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920.

<sup>15</sup> State v. Grimes, 49 Minn. 443, 52 N. W. 42; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

<sup>16</sup> Ex parte Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701.

<sup>17</sup> Smith v. Mayor, etc., of City of Knoxville, 3 Head (Tenn.) 245; Maxwell v. Jonesboro Corporation, 11 Heisk. (Tenn.) 257.

or females;<sup>18</sup> and in general may enact such ordinances as will tend to prevent such places from degenerating into nuisances or breeding disorder and crime.<sup>19</sup>

#### *License*

Even where a privilege license may not be required as a means of municipal revenue, a city may, under the police power, require license for any profession, trade, or business the supervision of which tends to promote municipal health, safety, order, or welfare;<sup>20</sup> and this either because the trade or profession requires a certain degree of skill or training,<sup>21</sup> or because it furnishes opportunities for fraud,<sup>22</sup> or because proper municipal police demands record of the persons engaged in various occupations.<sup>23</sup> But authority to require license has been declared not to be inherent in the municipality.<sup>24</sup> It must be expressly given or readily implied from the charter, or it will not exist in case of ordinary occupation.<sup>25</sup> And the cost of such license must not exceed the rea-

<sup>18</sup> City of Plattsburg v. Trimble, 46 Mo. App. 459; Bergman v. Cleveland, 39 Ohio St. 651.

<sup>19</sup> City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361.

<sup>20</sup> Nolin v. Mayor, etc., of Town of Franklin, 4 Yerg. (Tenn.) 163; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Atlantic City v. Brown, 71 N. J. Law, 81, 58 Atl. 110; City of St. Louis v. Fitz, 53 Mo. 582; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; Hill v. City Council of Abbeville, 59 S. C. 396, 38 S. E. 11.

<sup>21</sup> Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; Nashville, C. & St. L. R. Co. v. City of Attalla, 118 Ala. 362, 24 South. 450; Mayor, etc., of City of Savannah v. Charlton, 36 Ga. 460; State v. Hibbard, 3 Ohio, 63.

<sup>22</sup> Ward v. Farwell, 97 Ill. 593; Lothrop v. Stedman, 42 Conn. 583, Fed. Cas. No. 8,519; Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; City of Boston v. Schaffer, 9 Pick. (Mass.) 415; Temple v. Sumner, 51 Miss. 13, 24 Am. Rep. 615; Ex parte Ah Toy, 57 Cal. 92.

<sup>23</sup> Tied. Lim. § 101; Inhabitants of Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Blydenburgh v. Miles, 39 Conn. 484; Borough of Warren v. Geer, 117 Pa. 207, 11 Atl. 415.

<sup>24</sup> State ex rel. Moriarity v. McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; Ex parte Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

<sup>25</sup> State v. Itzcovitch, 49 La. Ann. 366, 21 South. 544, 37 L. R. A. 673, 62 Am. St. Rep. 648.

sonable expense of municipal supervision.<sup>26</sup> Accordingly, a license charge of \$40 per year on hacks has been held unlawful.<sup>27</sup> Ordinances requiring licenses from peddlers,<sup>28</sup> plumbers,<sup>29</sup> auctioneers,<sup>30</sup> bakers,<sup>31</sup> draymen,<sup>32</sup> hackmen,<sup>33</sup> green grocers,<sup>34</sup> pawnbrokers,<sup>35</sup> milk dealers,<sup>36</sup> billiard saloons,<sup>37</sup> livery stables,<sup>38</sup> showmen,<sup>39</sup> hucksters,<sup>40</sup> lawyers and

<sup>26</sup> *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *State v. Cassidy*, 22 Minn. 321, 21 Am. Rep. 765.

<sup>27</sup> *City of Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367.

<sup>28</sup> *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531.

<sup>29</sup> *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182.

<sup>30</sup> *Town of Decorah v. Dunstan*, 38 Iowa, 96; *Fretwell v. City of Troy*, 18 Kan. 271; *Wiggins v. City of Chicago*, 68 Ill. 372.

<sup>31</sup> *PEOPLE v. WAGNER*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141, Cooley, Cas. Mun. Corp. 247.

<sup>32</sup> *City of Brooklyn v. Breslin*, 57 N. Y. 591; *City of Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593.

<sup>33</sup> *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Commonwealth v. Page*, 155 Mass. 227, 29 N. E. 512; *Haynes v. City of Cape May*, 52 N. J. Law, 180, 19 Atl. 176.

Hackmen may be required, under police power, to occupy certain designated places at depots. *City of Ottawa v. Bodley*, 67 Kan. 178, 72 Pac. 545. See *Combs v. Lakewood Tp.*, 68 N. J. Law, 582, 53 Atl. 697; *Atlantic City v. Feretti*, 70 N. J. Law, 489, 57 Atl. 259; *City of New York v. Reesing*, 77 App. Div. 417, 79 N. Y. Supp. 331; *Mason v. City of Cumberland*, 92 Md. 451, 48 Atl. 136.

<sup>34</sup> *Frommer v. City of Richmond*, 31 Grat. (Va.) 646, 31 Am. Rep. 746.

<sup>35</sup> *Lauder v. City of Chicago*, 111 Ill. 291, 53 Am. Rep. 625; *Shuman v. City of Ft. Wayne*, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; *City of St. Paul v. Lytle*, 69 Minn. 1, 71 N. W. 703.

<sup>36</sup> *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *City of Chicago v. Bartee*, 100 Ill. 57; *City of Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771, 99 Am. St. Rep. 918.

But see, contra, *State v. Tyrrell*, 73 Conn. 407, 47 Atl. 686, where an ordinance requiring milk dealers to obtain a municipal license was held invalid, as being in conflict with the General Statutes of the state, and beyond the power of the city council to enact.

<sup>37</sup> *In re Snell*, 58 Vt. 207, 1 Atl. 566.

<sup>38</sup> *Municipality No. 2 v. Dubois*, 10 La. Ann. 56.

<sup>39</sup> *City of Boston v. Schaffer*, 9 Pick. (Mass.) 415.

<sup>40</sup> *Frommer v. City of Richmond*, 31 Grat. (Va.) 646, 31 Am. Rep.

doctors,<sup>41</sup> bankers,<sup>42</sup> junk shops,<sup>43</sup> telegraph companies,<sup>44</sup> natural gas companies,<sup>45</sup> pharmacists,<sup>46</sup> have been held valid under the police power. But the courts have repeatedly held such ordinances to be invalid, as unlawful interference with private rights under the pretext of police regulation, when it is apparent that the end sought is not the promotion of the public health, morals, or welfare.<sup>47</sup> The limit of the power is to prevent injury and regulate what is not harmful. A laundry may not be declared unlawful,<sup>48</sup> but the business may be lawfully confined within certain localities, and restricted to certain hours.<sup>49</sup>

746; *Dunham v. Trustees of Rochester*, 5 Cow. (N. Y.) 462; *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *City of Huntington v. Cheesbro*, 57 Ind. 74; *State v. Smith*, 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301.

<sup>41</sup> *Young v. Thomas*, 17 Fla. 169, 35 Am. Rep. 93; *City of Girard v. Bissell*, 45 Kan. 66, 25 Pac. 232; *Mayor, etc., of City of Savannah v. Charlton*, 36 Ga. 460; *State v. Proudfit*, 3 Ohio, 63; *Ahlrichs v. City of Cullman*, 130 Ala. 674, 31 South. 1035; *Elliott v. City of Louisville*, 101 Ky. 262, 40 S. W. 690; *State ex rel. Paquet v. Fernandez*, 49 La. Ann. 764, 21 South. 591. Cf. *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

<sup>42</sup> *Oil City v. Oil City Trust Co.*, 11 Pa. Co. Ct. R. 350.

<sup>43</sup> *City Council of Charleston v. Goldsmith*, 12 Rich. (S. C.) 470.

<sup>44</sup> *City of Allentown v. Western Union Telegraph Co.*, 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *Hodges v. Western Union Telegraph Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Borough of New Hope v. Western Union Telegraph Co.*, 16 Pa. Super. Ct. 306; *Taylor v. Postal Telegraph & Cable Co.*, 16 Pa. Super. Ct. 344.

<sup>45</sup> *Rushville Gas Co. v. City of Rushville*, 121 Ind. 212, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388.

<sup>46</sup> *People v. Rontey*, 51 Hun, 640, 4 N. Y. Supp. 235.

<sup>47</sup> *Robinson v. Mayor, etc., of Town of Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625; *Bethune v. Hughes*, 28 Ga. 560, 73 Am. Dec. 789; *City of Buffalo v. Linsman*, 113 App. Div. 584, 98 N. Y. Supp. 737; *City of Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93; *Caldwell v. City of Alton*, 33 Ill. 416, 75 Am. Dec. 282; *White v. Kent*, 11 Ohio St. 550.

<sup>48</sup> *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *State v. Taft*, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. Rep. 768.

<sup>49</sup> *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

The city may also pass ordinances requiring the inspection of

*Liquor Selling*

Municipal restraint upon the subject of liquor selling is now comparatively rare because of the control of this traffic by state and federal laws. The municipal corporation possesses no inherent power over this traffic, but only the express and implied powers conferred by the charter.<sup>50</sup> Wherever the power of regulation is conferred, the municipality may require a license,<sup>51</sup> may forbid the employment of women in the traffic,<sup>52</sup> may confine sales within reasonable hours<sup>53</sup> and within prescribed territorial limits,<sup>54</sup> and may regulate the traffic by other wholesome restrictions.<sup>55</sup>

laundries, and may provide for a reasonable fee to be paid to cover the cost of such inspection. *City of New Orleans v. Hop Lee*, 104 La. 601, 29 South. 214.

<sup>50</sup> *Loeb v. City of Attica*, 82 Ind. 175, 42 Am. Rep. 494; *Ex parte Burnett*, 30 Ala. 461; *Ex parte Campbell*, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418.

<sup>51</sup> *Bancroft v. Dumas*, 21 Vt. 456; *Thomasson v. State*, 15 Ind. 449; *Goddard v. President, etc., of Town of Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773; *City of Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221; *Schweitzer v. City of Liberty*, 82 Mo. 309; *Charleston City Council v. Heisembittel City Council*, 2 McMul. (S. C.) 233.

<sup>52</sup> *Bergman v. Cleveland*, 39 Ohio St. 651.

<sup>53</sup> *Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768; *State v. Welch*, 36 Conn. 215; *Morris v. City Council of Rome*, 10 Ga. 532; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660.

<sup>54</sup> *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611; *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812; *In re WILSON*, 32 Minn. 145, 19 N. W. 723, *Cooley, Cas. Mun. Corp.* 116, 349.

<sup>55</sup> *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; *Decie v. Brown*, 167 Mass. 290, 45 N. E. 765; *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302; *Metcalf v. State*, 76 Ga. 308; *Ex parte Hayes*, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; *State v. Hellman*, 56 Conn. 190, 14 Atl. 806.

## MARKETS

103. The establishment and regulation of municipal markets is a proper exercise of the police power for the convenience, health, and general welfare of the municipality. A municipal market is a designated place in a town or city, with convenient fixtures for the sale of provisions and articles of daily consumption, with proper regulations and officers, where all persons may lawfully be for the purpose of buying or selling.

In England the market has been time out of mind an essential part of the municipality, generally regarded as a prescriptive right or power, with certain customary regulations and privileges.<sup>56</sup> In America the establishment and regulation of markets is generally granted by charter; and after much contention it has been generally decided that the city may prohibit the sale of fresh meat, vegetables, and other provisions elsewhere than in the public market,<sup>57</sup> upon the ground, as stated in a leading Louisiana case, that "the privilege of keeping a private market is subordinate to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity."<sup>58</sup> In the exercise of this power the city may require the payment of a li-

<sup>56</sup> 2 Bl. Comm. 37; Grant, Corp. 166; 1 Dill. Mun. Corp. § 380.

<sup>57</sup> First Municipality v. Cutting, 4 La. Ann. 335; Newson v. City of Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; City of Jacksonville v. Ledwith, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558; Commonwealth v. Rice, 9 Metc. (Mass.) 253; State v. Smith, 123 Iowa, 654, 96 N. W. 899; Town of Crowley v. Rucker, 107 La. 213, 31 South. 629; City of Buffalo v. Hill, 79 App. Div. 402, 79 N. Y. Supp. 449; City of Brooklyn v. Breslin, 57 N. Y. 591; Kinsley v. City of Chicago, 124 Ill. 359, 16 N. E. 260; Wartman v. City of Philadelphia, 33 Pa. 202.

<sup>58</sup> City of New Orleans v. Stafford, 27 La. Ann. 417, 21 Am. Rep. 563.

cense fee for market privileges,<sup>59</sup> may fix market hours,<sup>60</sup> may prohibit street vending,<sup>61</sup> and provide for inspection and weighing of market articles.<sup>62</sup> Market ordinances like those above mentioned have been generally sustained by the courts upon the express view that they are not in restraint of trade, but for the wholesome regulation of it, and in the lawful exercise of the police power.<sup>63</sup>

### VIOLETION AND ENFORCEMENT

104. Violations of police regulations are usually punished by a court proceeding in personam for the recovery or enforcement of the affixed penalty, but in many cases the police power is enforced in rem in a summary manner.

As we have heretofore seen,<sup>64</sup> the proceeding for violation of municipal ordinances is variously viewed in the courts of the several states; but all concur that no judgment can be pronounced or penalty inflicted in personam except through some regular judicial proceeding.<sup>65</sup> This rule applies to the

<sup>59</sup> City of Cincinnati v. Buckingham, 10 Ohio, 257; Blanchard v. Ivers, 40 Fla. 117, 24 South. 66.

<sup>60</sup> City of Bowling Green v. Carson, 10 Bush (Ky.) 64.

<sup>61</sup> Launder v. City of Chicago, 111 Ill. 291, 53 Am. Rep. 625.

<sup>62</sup> Taylor v. City of Pine Bluff, 34 Ark. 603; Paige v. Fazackerly, 36 Barb. (N. Y.) 392; Pierce v. Kimball, 9 Greenl. (Me.) 54, 23 Am. Dec. 539; Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370; Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Hoffman v. Mayor, etc., of Jersey City, 34 N. J. Law, 172; Wartman v. City of Philadelphia, 33 Pa. 202; State v. Smith, 123 Iowa, 654, 96 N. W. 899.

Also a municipality may require that coal be weighed on the city scales. Wills v. City of Ft. Smith, 70 Ark. 221, 66 S. W. 922.

<sup>63</sup> Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; Taylor v. City of Pine Bluff, *supra*; Collins v. City of Louisville, 2 B. Mon. (Ky.) 134; Badkins v. Robinson, 53 Ga. 613; Yates v. City of Milwaukee, 12 Wis. 673.

<sup>64</sup> Ante, §§ 52, 53.

<sup>65</sup> Cooley, *Const. Lim.* (6th Ed.) 431 et seq.; Meaher v. Mayor, etc., of City of Chattanooga, 1 Head (Tenn.) 74; Lanfear v. Mayor, etc.,

enforcement of police regulations as well as to other ordinances. Trial and conviction without a jury is called by some judges a summary proceeding;<sup>66</sup> but herein the word "summary" is used to describe an extrajudicial enforcement of the police power in a summary manner without legal process. For example, a city council has power to confer upon the board of health authority to demolish a house infected with smallpox as a nuisance dangerous to the public health.<sup>67</sup> So, also, it has been held that a city may order a wooden house to be torn down which is built within the fire limits in defiance of the ordinance forbidding it;<sup>68</sup> and, as we have seen, the municipal corporation, without either statute or ordinance, may cause a private building to be demolished to stop conflagration.<sup>69</sup> So, too, a ferocious dog, or any other animal damage feasant in a municipality, may be killed, if necessary;<sup>70</sup> also a vagrant dog, unmuzzled, and addicted to biting, though doing no harm at the time, may be summarily killed as a measure of precaution.<sup>71</sup> In some states, too, the police are authorized to kill all unlicensed dogs wheresoever found.<sup>72</sup>

of New Orleans, 4 La. 97, 23 Am. Dec. 477; *State v. Lockwood*, 43 Wis. 403; *Town of Brookville v. Gagle*, 73 Ind. 117. See, also, *Blanchard v. Bristol*, 100 Va. 469, 41 S. E. 948.

<sup>66</sup> Strong, J., in *Byers v. Commonwealth*, 42 Pa. 94.

<sup>67</sup> *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Waters v. Townsend*, 65 Ark. 613, 47 S. W. 1054; *Theilan v. Porter*, 14 Lea (Tenn.) 622, 52 Am. Rep. 173.

<sup>68</sup> *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *City of Charles-ton v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *McKibbin v. Town of Ft. Smith*, 35 Ark. 352; *State v. Mayor, etc., of City of Knoxville*, 12 Lea (Tenn.) 146, 47 Am. Rep. 331; *Eichenlaub v. City of St. Joseph*, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

<sup>69</sup> *Ante*, § 100.

<sup>70</sup> *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35.

<sup>71</sup> *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Simmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253; *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677; *Ranson v. Kitner*, 31 Ill. App. 241; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749.

<sup>72</sup> *Mowery v. Town of Salisbury*, 82 N. C. 175; *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *State v. City of To-*

Similar to this is the summary arrest and confinement by the police in the lockup of persons of the drunk and disorderly class, and, as we have seen,<sup>78</sup> the use of force, even to mayhem or death, if necessary, to disperse a mob or quell a riot.

peka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *Julienne v. City of Jackson*, 69 Miss. 34, 10 South. 43, 30 Am. St. Rep. 526.

<sup>78</sup> *Ante*, § 95; *Dargan v. Mayor, etc., of City of Mobile*, 31 Ala. 469, 70 Am. Dec. 505; *Stewart v. City of New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218.

But a municipal corporation cannot maintain a suit for a violation of one of the criminal statutes of the state. *McMinnville v. Stroud*, 109 Tenn. 569, 72 S. W. 949.

## CHAPTER XI

### STREETS, SEWERS, PARKS, AND PUBLIC BUILDINGS

- 105. Streets.
- 106-107. Legislative Control.
- 108. Dedication and Acceptance.
- 109. Use of Streets.
- 110. Abutting Owners.
- 111. Sewers.
- 112. Parks.
- 113. Public Buildings.

### STREETS

105. "Street" is a generic term usually employed to describe any public highway, whether improved or unimproved, lawfully established and opened in a municipality to the public use for travel and traffic.

The term "street" in its legal acceptation is a generic term used to designate ways established or opened within a municipality for the ordinary purposes of travel, and embraces not only streets commonly so called, but also avenues and alleys.<sup>1</sup> It includes all parts of the way—the roadway, the gutters, and the sidewalks.<sup>2</sup>

It refers to the public ways, as distinguished from those private ways in a municipality which have not been dedicated to or accepted for public use, but are owned and enjoyed by private persons.<sup>3</sup> A turnpike owned by a private corporation

<sup>1</sup> Elliott, Roads & S. c. 2; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Heiple v. City of East Portland, 13 Or. 97, 8 Pac. 907; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; Village of Marseilles v. Howland, 124 Ill. 551, 16 N. E. 883.

<sup>2</sup> Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721; City of Kokomo v. Mahan, 100 Ind. 242.

<sup>3</sup> City of Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Henkel v. Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464; Hamilton v. Chicago, B. & Q. R. Co., 124 Ill. 241, 15 N. E. 854.

is not, therefore, properly called a street.\* The term is used to describe any public road inside municipal boundaries, and does not properly embrace rural or suburban roads.<sup>5</sup> Whenever duly established and opened, it becomes a street, whether it is worked upon and improved, or left in its natural state. It is dedicated to the public and accepted and held by it for the public use of trade and travel, and may not be perverted to other uses.<sup>6</sup>

### LEGISLATIVE CONTROL

106. The supreme power over streets, as over public highways, is inherent in the state, for the public use.
107. The legislative control over streets may be, and usually is, delegated to the municipality, and the power thus conferred upon it to open, graduate, improve, regulate, and close its own streets.

The state, as the sovereign agency of the people for the purposes of government, holds all public powers and utilities in trust for the public welfare, including those within as well as those beyond municipal boundaries.<sup>7</sup> Its proper function is to decide what conveniences the public may enjoy for traffic and travel. Within constitutional limitations, it may determine when, where, and how streets, as other public highways,

\* Elliott, Roads & S. p. 60; Parker v. Mayor, etc., of City of New Brunswick, 30 N. J. Law, 395; Wilson v. Allegheny City, 79 Pa. 272; Henkel v. Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464.

<sup>5</sup> Common Council of Indianapolis v. Croas, 7 Ind. 9; Cowan's Case, 1 Overt. (Tenn.) 311; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; Heiple v. City of East Portland, 13 Or. 97, 8 Pac. 907.

<sup>6</sup> Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365; John Anisfield Co. v. Edward B. Grossman & Co., 98 Ill. App. 180; Brace v. New York Cent. R. Co., 27 N. Y. 271; Dexter v. Tree, 117 Ill. 535, 6 N. E. 506; TOWNSEND v. EPSTEIN, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; Cooley, Cas. Mun. Corp. 254; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

<sup>7</sup> Kreigh v. City of Chicago, 86 Ill. 407; Elliott, Roads & S. § 656; Astor v. Mayor, etc., of City of New York, 62 N. Y. 567.

shall be opened, graduated, improved, and regulated;<sup>8</sup> and, though a street is used by the public for the purposes of travel and traffic, the state may determine and declare the manner of the use of particular streets, excluding traffic from some, and allowing railroads or street cars upon them, as it deems best;<sup>9</sup> and it has even been held that the state may allow barriers, such as tollgates, to be erected upon them.<sup>10</sup> The state may also vacate streets and close them to the public when it sees fit, but not so as to destroy the vested rights of abutting proprietors.<sup>11</sup>

<sup>8</sup> Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; Barrows v. City of Sycamore, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. Rep. 400; SIMON v. NORTHUP, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171, Cooley, Cas. Mun. Corp. 57; Daley v. City of St. Paul, 7 Minn. 390 (Gil. 311); Baird v. Rice, 63 Pa. 489.

A city council may prescribe by resolution that portion of a street which shall be used as a sidewalk. Cox v. Lancaster, 24 Ohio Cir. Ct. R. 265.

A public street is a passage open to all the citizens of the state to go and to return, subject to the law of the road. No one man or body of men has a superior right upon and in the street as against the general public. Chicago Union Traction Co. v. Stanford, 104 Ill. App. 99.

<sup>9</sup> People v. Kerr, 27 N. Y. 188; Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 676; Floyd County v. Rome St. R. Co., 77 Ga. 614, 3 S. E. 3.

<sup>10</sup> Milarkey v. Foster, 6 Or. 378, 25 Am. Rep. 531; Stormfeltz v. Manor Turnpike Co., 13 Pa. 555.

<sup>11</sup> Mahady v. Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661; Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156, 2 Ann. Cas. 83; Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Cooper v. City of Detroit, 42 Mich. 584, 4 N. W. 262; Elliott, Mun. Corp. § 399.

No user of a portion of a street cannot operate as a surrender or abandonment of the same for the purposes of a public street. City of Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127. But a city council having been given no authority to vacate or abandon the public easement of a street an attempted abandonment of such easement by the city is ultra vires. MacIntosh v. Town of Nome, 1 Alaska, 492.

Mere inconvenience to a property owner from the vacation of a

*Delegation of Power*

The power of control over the streets may be and usually is delegated to the municipality.<sup>12</sup> The power of a municipality to control its own streets depends entirely upon the provisions of the charter or the general statutes.<sup>13</sup> In some cases the power granted has been held to be unlimited, and the municipality vested with all the inherent power of control over the streets primarily possessed by the state.<sup>14</sup> The grant is usually expressed in general terms, such as to lay out, open, grade, and otherwise improve streets and keep them in repair;<sup>15</sup> or to have power over its streets;<sup>16</sup> or to have the care, su-

street, which will also result to the general public, does not warrant injunctive relief. *Hall v. Lebanon*, 31 Ind. App. 265, 67 N. E. 703.

An abutting owner is entitled to an easement in the full length of the street, and not merely to that part of the street directly in front and between the lines of the lot. *Healey v. Kelly*, 24 R. I. 581, 54 Atl. 588.

<sup>12</sup> *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156, 2 Ann. Cas. 83.

<sup>13</sup> Municipal corporations have no inherent power to regulate and control streets therein, for streets and highways belonging to the state are under its control. *Raynolds v. Cleveland*, 24 Ohio Cir. Ct. R. 215.

See *Kean v. City of Elizabeth*, 55 N. J. Law, 337, 26 Atl. 939; *McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896; *Citizens' St. R. Co. v. Memphis* (C. C.) 53 Fed. 715; *Shirk v. City of Chicago*, 195 Ill. 298, 63 N. E. 193.

Municipal corporations have the power to grant franchises to use streets for street railway purposes only by delegation from the state. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. See, also, *State v. Yopp*, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714.

<sup>14</sup> *City of Terre Haute v. Turner*, 36 Ind. 522; *Illinois Cent. R. Co. v. City of Galena*, 40 Ill. 344; *Sinton v. Ashbury*, 41 Cal. 525; *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

<sup>15</sup> But a grant of power to establish, regulate and control streets, given at a time when street railways were not contemplated, does not give a municipality power to regulate and control the construction of street railways therein. *Raynolds v. Cleveland*, supra, note 13; *People v. Wilson*, 62 Hun, 618, 16 N. Y. Supp. 583; *Burr v. Town of New Castle*, 49 Ind. 322.

<sup>16</sup> *City of Hannibal v. Hannibal & St. J. R. Co.*, 49 Mo. 480.

pervision, and control of its streets.<sup>17</sup> These general grants of authority by the state over its own streets, to its duly authorized general agent, to do whatever the state might do in controlling them, are held to confer plenary powers upon the municipality.<sup>18</sup> The grant of power may, however, be partial, so that the state shall reserve to itself the sovereign power of exercising the right of eminent domain,<sup>19</sup> or the power to determine what streets may be occupied by street cars or common railways,<sup>20</sup> and also the designation of particular limits within the city wherein certain trades or business may be carried on.<sup>21</sup> It has been held that a state may delegate its control to two public corporations within the same territory;<sup>22</sup> but, because of the confusion and conflict likely to result from this double delegation of power, the courts will recognize it only when expressed in unmistakable language.<sup>23</sup> The judicial inclination also generally favors such construction of charters and general law as will vest the municipality with the control of its own streets.

#### *Discretion*

The power of control and regulation, whether exercised by the state or by the municipality under the delegation of pow-

<sup>17</sup> *Shelton v. Mayor of Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *White v. Kent*, 11 Ohio St. 550.

<sup>18</sup> *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Spokane St. Ry. Co. v. City of Spokane*, 5 Wash. 634, 32 Pac. 456; *North Pacific Lumber & Mfg. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4.

<sup>19</sup> *West v. Blake*, 4 Blackf. (Ind.) 284; *Kerrigan v. West Hoboken Tp.*, 37 N. J. Law, 77.

<sup>20</sup> *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *City of Clinton v. Cedar Rapids & M. R. Co.*, 24 Iowa, 455; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *City of Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252; *City of Houston v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 35 S. W. 74.

<sup>21</sup> 2 Dill. Mun. Corp. § 656.

<sup>22</sup> *City of Norwich v. Story*, 25 Conn. 44; *Town of Bennington v. Smith*, 29 Vt. 254; *Wells v. McLaughlin*, 17 Ohio, 99; *Baldwin v. Green*, 10 Mo. 410.

<sup>23</sup> *Common Council of Indianapolis v. Croas*, 7 Ind. 9; *State v.*

ers, is legislative in its nature, and is subject to judicial control only when, in the exercise of the power, constitutional limitations are contravened or there is an abuse of discretion,<sup>24</sup> though the general principle that a municipality is subject to judicial supervision in the exercise of its power over streets is recognized in many cases.<sup>25</sup>

### DEDICATION AND ACCEPTANCE

108. Dedication of property for street uses may be made by any legal or equitable owner, either in writing or orally, or by conduct, or acquiescence in public user, such as will suffice to estop claim to the contrary.

A dedication at common law is the appropriation and setting apart of private property to the use of the public.<sup>26</sup> It consists of both act and intention, and may be either express or implied;<sup>27</sup> express when the owner, either in writing or by parol, declares his intention to donate and surrender the prop-

Jones, 18 Tex. 874; Cross v. Mayor, etc., of Morristown, 18 N. J. Eq. 305.

<sup>24</sup> City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co., 69 Kan. 97, 76 Pac. 448; Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 Pac. 205.

Where the Legislature has vested in a village board discretionary power to vacate streets of the village, the courts will not ordinarily look into the motives influencing such board in doing such discretionary act. Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002; People v. Fields, 58 N. Y. 491; Oliver v. City of Worcester, 102 Mass. 489, 3 Am. Rep. 485; Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711.

<sup>25</sup> Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; Douglass v. City Council of Montgomery, 118 Ala. 599, 24 South. 745, 43 L. R. A. 376.

<sup>26</sup> Black, Law Dict., in verb.

<sup>27</sup> Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Village of Princeville v. Auten, 77 Ill. 325; McKee v. Perchment, 69 Pa. 342; State v. Woodward, 23 Vt. 92.

erty to the use of the public;<sup>28</sup> implied as when this intention is signified by a public platting of property and lots with open spaces apparently for street uses,<sup>29</sup> or when the public for a long time uses the property for a street with the knowledge of the owner; and without his objection.<sup>30</sup> Slight circumstances of assent do not suffice to constitute a dedication, nor long user without the owner's knowledge;<sup>31</sup> but, when the public use has been continuous and notorious for a long time, knowledge and assent may both be presumed.<sup>32</sup>

#### *Who May Dedicate—Common-Law Dedication*

Dedication may be made not only by a legal owner,<sup>33</sup> but also by the owner of the equitable interest,<sup>34</sup> or by a married woman,<sup>35</sup> but not by her husband.<sup>36</sup> The common-law dedi-

<sup>28</sup> Forney v. Calhoun County, 84 Ala. 215, 4 South. 153; Cook v. Harris, 61 N. Y. 448; Smith v. City of Navasota, 72 Tex. 422, 10 S. W. 414; Village of Winnetka v. Prouty, 107 Ill. 218; City of Shreveport v. Drouin, 41 La. Ann. 867, 6 South. 656; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130.

<sup>29</sup> Darker v. Beck, 56 Hun, 650, 11 N. Y. Supp. 94; Waugh v. Leech, 28 Ill. 488; Waltman v. Rund, 109 Ind. 366, 10 N. E. 117; Arrowsmith v. City of New Orleans, 24 La. Ann. 194.

<sup>30</sup> McKenna v. City of Boston, 131 Mass. 143; City of Chicago v. Sawyer, 166 Ill. 290, 46 N. E. 759; Faust v. City of Huntington, 91 Ind. 493; Hoole v. Attorney General, 22 Ala. 190.

<sup>31</sup> Gerberling v. Wunnenberg, 51 Iowa, 125, 49 N. W. 861; Mitchell v. City of Denver, 33 Colo. 37, 78 Pac. 686; McKey v. Village of Hyde Park (C. C.) 37 Fed. 389; People ex rel. El Dorado Co. v. O'Keefe, 79 Cal. 171, 21 Pac. 539.

<sup>32</sup> Smith v. Inge, 80 Ala. 283; Shea v. City of Ottumwa, 67 Iowa, 39, 24 N. W. 582; City of Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452.

<sup>33</sup> Lawe v. City of Kaukauna, 70 Wis. 306, 35 N. W. 561; Forney v. Calhoun County, 84 Ala. 215, 4 South. 153; Town of Edenville v. Chicago, M. & St. P. Ry. Co., 77 Iowa, 69, 41 N. W. 568.

<sup>34</sup> City of Hannibal v. Draper, 15 Mo. 638; Johnstone v. Scott, 11 Mich. 232; Williams v. First Presbyterian Society in Cincinnati, 1 Ohio St. 478.

<sup>35</sup> Todd v. Pittsburg, Ft. W. & C. R. Co., 19 Ohio St. 514; Schenley v. Commonwealth, to Use of City of Allegheny, 36 Pa. 29, 78 Am. Dec. 359.

<sup>36</sup> City of Indianapolis v. Patterson, 112 Ind. 344, 14 N. E. 551; City of Marshall v. Anderson, 78 Mo. 85.

cation does not pass the title, but only a public easement,<sup>37</sup> the title still remaining in the owner, who, upon abandonment of the easement, may resume possession. A dedication for street uses does not authorize the appropriation or conversion of the same to any other use, public or private.<sup>38</sup>

#### *Acceptance*

A common-law dedication for street uses is only consummated by an acceptance thereof by the municipality.<sup>39</sup> Acceptance can be made only by a duly authorized municipal agency; but acceptance, like dedication, may be either express or implied.<sup>40</sup> Implication of acceptance, however, is not to be made from mere public user; but it may be implied from municipal appropriation for the street, or work done upon it under mu-

<sup>37</sup> City of New Orleans v. U. S., 10 Pet. (U. S.) 662, 9 L. Ed. 573; McConnell v. Lexington, 12 Wheat. (U. S.) 582, 6 L. Ed. 735; City of Winona v. Huff, 11 Minn. 119 (Gil. 75); Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720; Stevenson v. City of Chattanooga (C. C.) 20 Fed. 586; City of Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; Bliss v. Ball, 99 Mass. 597; Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41, 11 N. W. 124; Baker v. City of St. Louis, 75 Mo. 671.

Where the city owns the land included within a street, the subsequent narrowing of such street does not give title to the abutting owner of the narrow strip of land. Watson v. City of New York, 67 App. Div. 573, 73 N. Y. Supp. 1027.

Under a common-law dedication, where a street is vacated by a city, the vacated portion reverts to the abutting owners, subject to such rights as other abutting property owners on the street may have therein. Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600.

<sup>38</sup> Gilman v. City of Milwaukee, 55 Wis. 328, 13 N. W. 266; Mayor, etc., of City of New Orleans v. Leverich, 13 La. 332; Warren v. Mayor of City of Lyons, 22 Iowa, 351.

A city cannot authorize a private corporation to construct a railway track for its use on a public street. Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362; Heineck v. Grosse, 99 Ill. App. 441.

<sup>39</sup> Village of Winnetka v. Prouty, 107 Ill. 218; City of San Francisco v. Canavan, 42 Cal. 541; Holdane v. Trustees of Village of Cold Spring, 21 N. Y. 474.

<sup>40</sup> Baldwin v. City of Springfield, 141 Mo. 205, 42 S. W. 717; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Guthrie v. Town of New Haven, 31 Conn. 308.

nicipal authority.<sup>41</sup> The matter of acceptance becomes important sometimes from the municipal duty to care for and repair the public streets.<sup>42</sup> When, however, the dedication is by the state, no act of acceptance is necessary; the same being conclusively presumed, or, rather, authoritatively enjoined upon the municipality.<sup>43</sup>

#### *Statutory Dedication*

Statutory dedication, as its name implies, is such as the general statutes of a state prescribe, and is determined, as to its form and character, by the provisions of the statute. In general, it may be said that its essential points differ from the common-law dedication, in (1) that acceptance is not required;<sup>44</sup> (2) that it transfers the title of the land to the pub-

<sup>41</sup> Steel v. Burgess, etc., of Borough of Huntington, 191 Pa. 627, 43 Atl. 398; Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365; In re Hunter, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616; Morrison v. Burgess, etc., of Borough of Conshohocken, 17 Montg. Co. Law Rep'r (Pa.) 47; Folsom v. Town of Underhill, 36 Vt. 580; Parsons v. Trustees of Atlanta University, 44 Ga. 529; Kennedy v. Mayor and City Council of Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346; Gilder v. City of Brenham, 67 Tex. 345, 3 S. W. 309; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284).

The existence of a highway must be proved either by record, or by immemorial use and repair, or by dedication and acceptance. Stone v. Langworthy, 20 R. I. 602, 40 Atl. 832. See City of Chicago v. Sawyer, 166 Ill. 290, 46 N. E. 759.

<sup>42</sup> Requa v. City of Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Wisby v. Bonte, 19 Ohio St. 238.

A municipal corporation is bound to use ordinary care to keep its streets and sidewalks in a reasonably safe condition for public use. Town of Norman v. Teel, 12 Okl. 69, 69 Pac. 791. But the duty requiring a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is limited during the time occupied in making repairs and improvements. City of South Omaha v. Burke, 3 Neb. (Unof.) 309, 91 N. W. 562; Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

See City of Elgin v. Thompson, 98 Ill. App. 358; Fockler v. Kansas City, 94 Mo. App. 464, 68 S. W. 363; Anderson v. Albion, 64 Neb. 280, 89 N. W. 794; Bieber v. St. Paul, 87 Minn. 35, 91 N. W. 20; Ray v. Colby & Tenney, 5 Neb. (Unof.) 151, 97 N. W. 591.

<sup>43</sup> Reilly v. City of Racine, 51 Wis. 526, 8 N. W. 417.

<sup>44</sup> Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; New Jersey Junction

lic.<sup>45</sup> A donee or grantee need not usually be named, the dedication being to a public use; but, wherever local law may require a trustee for such use, he will be appointed in equity, so that the trust may not fail.<sup>46</sup>

### USE OF STREETS

109. The primary use for which streets are dedicated is free and unobstructed passage over them; but this use may be modified or temporarily obstructed under municipal authority for other necessary and appropriate municipal purposes, not inconsistent with, nor destructive of, the primary use of public travel.

The use of a street may be either public or private. Its use for travel is admittedly public, while its use for the deposit of material, for the display of goods or hanging of signs is admittedly private. The municipality has the same right to control and regulate the private as the public uses.<sup>47</sup> But the general principle that the municipality holds the streets in trust for public purposes must always control, and it cannot put them to any use inconsistent with their use as streets, or grant rights or privileges to private persons which prevent their use as thoroughfares for public travel.<sup>48</sup>

The construction of buildings along the street may require a temporary deposit of building material in the street, or the preparation of material or other work of construction therein

R. Co. v. Jersey City, 68 N. J. Law, 108, 52 Atl. 352, affirmed in 70 N. J. Law, 826, 59 Atl. 1117; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; People v. Jones, 6 Mich. 176.

<sup>45</sup> Wood v. National Water Works Co., 33 Kan. 590, 7 Pac. 233; Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N. E. 866.

<sup>46</sup> Bryant's Lessee v. McCandless, 7 Ohio, 135, pt. 2.

<sup>47</sup> Edison Electric Light & Power Co. of St. Paul v. Blomquist (C. C.) 185 Fed. 615.

<sup>48</sup> Bennett v. Town of Mt. Vernon, 124 Iowa, 537, 100 N. W. 349; TOWNSEND v. EPSTEIN, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441, Cooley, Cas. Mun. Corp. 254; Snyder v. City of

to the inconvenience of the public;<sup>49</sup> but permission for such use may be granted by the municipality<sup>50</sup>—usually, however, upon bond for the protection of the city against damages from the abuse of the privilege. Such obstructions must be reasonable, and not so long continued as to prove a nuisance.<sup>51</sup> The municipal license will not protect the licensee from liability for damages to any abutting owner suffering special injury from the obstruction.<sup>52</sup> And for the protection of the public the city may require that the owner or contractor erecting a building shall build a covered passway over the sidewalk.<sup>53</sup> Permission may be granted to use the street for moving buildings<sup>54</sup> or for unloading cars,<sup>55</sup> but such obstruction must be

Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; CITY COUNCIL OF AUGUSTA v. BURUM, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340, Cooley, Cas. Mun. Corp. 264.

<sup>49</sup> People v. Mayor, etc., of New York, 59 How. Prac. (N. Y.) 277; Commonwealth v. Passmore, 1 Serg. & R. (Pa.) 217; Raymond v. Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

<sup>50</sup> Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171; Wood v. Mears, 12 Ind. 515, 74 Am. Dec. 222; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; McCarthy v. City of Chicago, 53 Ill. 38.

<sup>51</sup> McCarthy v. City of Chicago, *supra*; First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46; Lund v. St. Paul, M. & M. R. Co., 31 Wash. 286, 71 Pac. 1032, 61 L. R. A. 506, 96 Am. St. Rep. 906; State v. Pratt, 52 Minn. 131, 53 N. W. 1069; Commonwealth v. Passmore, *supra*; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573.

Any permanent structure on a street for private use is a presumption and a nuisance. Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621.

<sup>52</sup> St. Vincent Female Orphan Asylum v. City of Troy, 76 N. Y. 108, 32 Am. Rep. 286. Contra, Garrett v. Janes, 65 Md. 260, 3 Atl. 597. Cf. Salisbury v. Andrews, 128 Mass. 336.

<sup>53</sup> Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912.

<sup>54</sup> Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Day v. Green, 4 Cush. (Mass.) 433; Williams v. Citizens' Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201.

Where a council grants a permit to move a building through the streets, there is no implied authority to cut or remove branches from

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<sup>55</sup> Mathews v. Kelsey, 58 Me. 56, 4 Am. Rep. 248.

discontinued within the shortest practicable time. And it has been held that the right to abate a street nuisance by proceeding in equity cannot be defeated by a municipal license or laches or estoppel,<sup>56</sup> nor by prescription or statute of limitations.<sup>57</sup> The municipality, in maintaining the streets, is performing a governmental function which cannot be alienated<sup>58</sup> or lost;<sup>59</sup> and herein applies the maxim, "Nullum tempus occurrit regi."

trees located between the sidewalk and the curb of the street, though necessary to use the permit. *State v. Pratt*, 52 Minn. 131, 53 N. W. 1069.

The use of a street for moving a building may be permitted, but not so as to destroy the use of the street for travel or necessary public purposes, or so as to destroy or impair vested rights. *Northwestern Telephone Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 65 L. R. A. 771, 102 Am. St. Rep. 580, 1 Ann. Cas. 110. See, also, *Edison Electric Light & Power Co. of St. Paul v. Blomquist* (C. C.) 185 Fed. 615.

<sup>56</sup> *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 63.

But where a city sees a landowner taking possession of a part of a street under an apparent claim of right, and, without objection, permits him to go on for years making improvements which the assertion of the public right to the whole street would destroy or impair, it is estopped by its laches to assert such right. *Corey v. Ft. Dodge*, 118 Iowa, 742, 92 N. W. 704. See, also, *Dickerson v. Mayor, etc., of City of Le Roy*, 72 Ill. App. 588.

<sup>57</sup> *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; *Meyer v. City of Lincoln*, 33 Neb. 566, 50 N. W. 763, 18 L. R. A. 146, 29 Am. St. Rep. 500.

<sup>58</sup> *Chicago General Ry. Co. v. Chicago City Ry. Co.*, 62 Ill. App. 502; *Colwell v. Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87.

A city in Indiana, vested by statute with exclusive authority, jurisdiction, and power over its streets, cannot alienate such power by a grant to a street railway company in perpetuity to build and operate its road through the streets. *Logansport R. Co. v. City of Logansport* (C. C.) 114 Fed. 688. See *Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co.*, 39 Fla. 306, 22 South. 692; *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621.

<sup>59</sup> *Atlantic City v. Snee*, 68 N. J. Law, 39, 52 Atl. 372; *Blennerhassett v. Forest City*, 117 Iowa, 680, 91 N. W. 1044; *Wakeling v. Cock-*

*Authorized Uses*

The municipality may also authorize the use of streets for telegraph, telephone, and electric poles and wires,<sup>60</sup> street and commercial railways,<sup>61</sup> and may allow below the surface the laying of gas, water, and sewer mains and pipes, and the construction of subways.<sup>62</sup> Poles may not be planted and wires strung for electric use in the streets without express consent of the municipality;<sup>63</sup> and it has been held that the municipality may not grant this privilege unless thereunto expressly authorized.<sup>64</sup> But the decisions upon this subject are not en-

er, 23 Pa. Super. Ct. 196; Sims v. City of Chattanooga, 2 Lea (Tenn.) 694; Burbank v. Fay, 65 N. Y. 57; Kopf v. Utter, 101 Pa. 27.

<sup>60</sup> Aurora Electric Light & Power Co. v. McWethy, 104 Ill. App. 479; McWethy v. Aurora Electric Light & Power Co., 202 Ill. 218, 67 N. E. 9; Village of London Mills v. Fairview London Telephone Circuit, 105 Ill. App. 146; Taylor v. Portsmouth, K. & Y. St. Ry., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; Mutual Union Telegraph Co. v. City of Chicago (C. C.) 16 Fed. 309.

A city cannot revoke its license granted to a telephone company to erect poles on its streets after the company has completed its work in accordance with the conditions of the ordinance granting the permit. Phillipsburg Electric Lighting, Heating & Power Co. v. Inhabitants of Town of Phillipsburg, 66 N. J. Law, 505, 49 Atl. 445. See Wyandotte Electric-Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821; Rutland Electric Light Co. v. Marble City Electric Light Co., 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. Rep. 868. But see Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495.

<sup>61</sup> Taylor v. Portsmouth, K. & Y. St. Ry., *supra*; Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; Detroit Citizens' St. Ry. Co. v. City of Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667; Ruttle v. City of Covington, 10 S. W. 644, 10 Ky. Law Rep. 766; Daly v. Georgia S. & F. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286.

<sup>62</sup> Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117; Empire City Subway Co. v. Broadway & S. A. R. Co., 159 N. Y. 555, 54 N. E. 1092; City of Quincy v. Bull, 106 Ill. 337; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; State ex rel. Attorney General v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262.

<sup>63</sup> State ex rel. Wisconsin Tel. Co. v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657; Domestic Telephone Co. v. Newark, 49 N. J. Law, 344, 8 Atl. 128; Julia Bldg. Ass'n v. Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398.

<sup>64</sup> Commonwealth v. City of Boston, 97 Mass. 555; Irwin v. Great

tirely harmonious;<sup>65</sup> and, if such electric wires become so numerous as to impair the public safety, the municipality may require that they shall be taken off the streets and placed below the surface.<sup>66</sup>

### *Street Railways*

After some contention, the power of a municipality to authorize the construction of street railways in its streets has been thoroughly established and uniformly recognized;<sup>67</sup> but the city may impose such conditions as the safety of the public or the welfare of the municipality may require,<sup>68</sup> not only at the time of granting the privilege, but also thereafter in the

Southern Telephone Co., 37 La. Ann. 63; Dodd v. Consolidated Traction Co., 57 N. J. Law, 482, 31 Atl. 980; Barhite v. Home Telephone Co. of Rochester, 50 App. Div. 25, 63 N. Y. Supp. 659.

Such privilege, being legislative in its character, is not subject to judicial revision at the suit of an abutting owner on the ground of inexpediency. Lange v. La Crosse & Eastern R. Co., 118 Wis. 558, 95 N. W. 952.

<sup>65</sup> Meyers v. Hudson County Electric Co., 63 N. J. Law, 573, 44 Atl. 713; Dodd v. Consolidated Traction Co., *supra*; East Tennessee Telephone Co. v. City of Russellville, 106 Ky. 667, 51 S. W. 308, 21 Ky. Law Rep. 305; Julia Bldg. Ass'n v. Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398; Western Union Telegraph Co. v. City of New York (C. C.) 38 Fed. 552, 3 L. R. A. 449; City of Geneva v. Geneva Telephone Co., 30 Misc. Rep. 236, 62 N. Y. Supp. 172; State ex rel. National Subway Co. v. City of St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

<sup>66</sup> O'Brien v. City of Erie, 20 Pa. Co. Ct. R. 337, 7 Pa. Dist. R. 491; Michigan Telephone Co. v. City of Charlotte (C. C.) 93 Fed. 11; Chesapeake & P. Telephone Co. v. City of Baltimore, 89 Md. 689, 44 Atl. 1033; Western Union Telegraph Co. v. City of New York (C. C.) 38 Fed. 552, 3 L. R. A. 449.

<sup>67</sup> Blair v. City of Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; City R. Co. v. Citizens' Street R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Almand v. Atlanta Consol. St. Ry. Co., 108 Ga. 417, 34 S. E. 6; St. Louis & S. R. Co. v. Lindell R. Co., 190 Mo. 246, 88 S. W. 634; Watson v. Fairmont & S. Ry. Co., 49 W. Va. 528, 39 S. E. 193. But the power exists only by virtue of a delegation by the state. Allen v. Clausen, 114 Wis. 244, 90 N. W. 181; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277. See, also, City of Stillwater v. Lowry, 83 Minn. 275, 86 N. W. 103.

<sup>68</sup> Fath v. Tower Grove & L. Ry., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; City of Philadelphia v. Ridge Ave. Pass. Ry. Co., 143 Pa.

exercise of the police powers;<sup>69</sup> and it has been held that, for a breach of these conditions, franchises may be declared forfeited by the court.<sup>70</sup> The power of the city to grant a franchise for the use of its streets to an ordinary railroad without express authority has been doubted;<sup>71</sup> and it has been held that such right cannot be granted for the private use of individuals.<sup>72</sup>

### *Surface and Underground Control of Streets*

The municipality has control of its streets below as well as above the surface, and may therefore grant to public service

444, 22 Atl. 695; *City of New Orleans v. New Orleans City & L. R. Co.*, 40 La. Ann. 587, 4 South. 513.

<sup>69</sup> *State v. Sloan*, 48 S. C. 21, 25 S. E. 898; *Textor v. Baltimore & O. R. Co.*, 59 Md. 63, 43 Am. Rep. 540; *Pittsburg, Ft. W. & C. Ry. Co. v. City of Chicago*, 159 Ill. 369, 42 N. E. 781.

<sup>70</sup> *State ex rel. Attorney General v. Madison Street Ry. Co.*, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; *Galveston & W. Ry. Co. v. City of Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33.

<sup>71</sup> *Stanley v. City of Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; *Tallon v. City of Hoboken*, 60 N. J. Law, 212, 37 Atl. 895; *Delaware, L. & W. R. Co. v. City of Buffalo*, 158 N. Y. 266, 53 N. E. 44; *CITY OF ST. PAUL v. CHICAGO, M. & ST. P. RY. CO.*, 63 Minn. 330, 65 N. W. 649, 34 L. R. A. 184; *Cooley, Cas. Mun. Corp.* 259; *Ruttle v. City of Covington*, 10 Ky. Law Rep. 766, 10 S. W. 644; *Daly v. Georgia S. & F. R. Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286; *McGann v. People ex rel. Coffeen*, 194 Ill. 526, 62 N. E. 941.

A municipality, having power over its streets, must exercise it for the general public, and cannot grant a railway company such use of a street as will destroy its public usefulness. *Burnes v. City of St. Joseph*, 91 Mo. App. 489. But see *Town of New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 57 N. E. 516; *Stockdale v. Rio Grande Western R. Co.*, 28 Utah, 201, 77 Pac. 849.

<sup>72</sup> *People v. Blocki*, 203 Ill. 363, 67 N. E. 809; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; *Glaessner v. Anheuser-Busch Brewing Association*, 100 Mo. 508, 13 S. W. 707; 3 Elliott, R. R. § 1077. But see *Texarkana & Ft. S. R. Co. v. Texas & N. O. R. Co.*, 28 Tex. Civ. App. 551, 67 S. W. 525. The erection of buildings on a public street is an invasion of the rights of both the public and every owner of land abutting thereon. *Northern Pac. Ry. Co. v. Lake*, 10 N. D. 541, 88 N. W. 461; *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54, 26 S. E. 477.

corporations the right to lay pipes and mains and to construct subways for all proper municipal purposes. These may include not only pipes and mains for water, gas, and sewage, in case the city has no public system, but also conduits for electric wires and subways for railroads. And in general, it may be said that the power of the municipality over and under its streets, when exercised for the public use, is plenary.<sup>73</sup>

#### *Vacation*

A public street of a city cannot be vacated by the municipality, even in part, unless authority to do so is conferred in express terms or by necessary implication.<sup>74</sup> But the state, since it possesses paramount power over streets, may vacate them, or authorize their vacation by the municipality.<sup>75</sup> Such power, being discretionary, is rarely supervised or interfered with by the courts; but the vacation must be for public, not private, benefit. The vacation may be total, or partial only, and must be effected in the mode prescribed by law. Abutters have peculiar rights in streets, and always assert the old adage, "Once a highway, always a highway." They may not only stand surely upon "due process of law" for protection, but may also insist upon the constitutional right to compensa-

<sup>73</sup> City of Richmond v. Smith, 101 Va. 161, 43 S. E. 345; Budd v. Camden Horse R. Co., 63 N. J. Eq. 804, 52 Atl. 1130; Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711; City of Cincinnati v. Penny, 1 Ohio St. 499, 8 Am. Rep. 73; McKevitt v. Mayor, etc., of City of Hoboken, 45 N. J. Law, 482; Horton v. Mayor, etc., of City of Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1; Mayor, etc., of City of Americus v. Eldridge, 64 Ga. 524, 37 Am. Rep. 89; Pool v. Trexler, 76 N. C. 297; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39; People v. Nearing, 27 N. Y. 309; Ferrenbach v. Turner, 86 Mo. 416, 56 Am. Rep. 437. As to the use of the surface of the street for hack stands, see Odell v. Bretney, 38 Misc. Rep. 603, 78 N. Y. Supp. 67.

<sup>74</sup> City of Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 South. 692; Coker v. Atlanta K. & N. R. Co., 123 Ga. 483, 51 S. E. 481.

<sup>75</sup> Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156, 2 Ann. Cas. 83.

tion for the appropriation of their easement of access to the public use.<sup>76</sup>

#### *Abandonment*

Abandonment of streets has been recognized by some American courts as an informal but sufficient vacation; but, since it cannot be based upon lapse of time or nonuser, the evidence of the municipal conduct must exclude all reasonable doubt as to the fixed purpose to vacate a street.<sup>77</sup>

### ABUTTING OWNERS

**110. An abutting owner shares in all the rights of the general public, and, in addition thereto, has such special rights as arise from his property abutting on the street.**

All persons owning property fronting on a public street hold the same subject to the right of the public to do in respect thereto all such things as are usual and reasonable, and which the property owner may fairly be considered to have contemplated when the street was opened or dedicated.<sup>78</sup> The owner of course, shares in all the rights of the public, but in addition thereto he has certain special rights arising from his ownership.<sup>79</sup> Among these is the right of free and unimpeded

<sup>76</sup> Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Lahr's Case, 104 N. Y. 268, 10 N. E. 528; Butterworth v. Bartlett, 50 Ind. 537; City of Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Coster v. Mayor, etc., of City of Albany, 43 N. Y. 399; Elliott, Roads & S. p. 664; James v. City of Darlington, 71 Wis. 173, 36 N. W. 835; Hesing v. Scott, 107 Ill. 600. But on compensation, see McGee's Appeal, 114 Pa. 470, 8 Atl. 237.

<sup>77</sup> Warner v. Inhabitants of Holyoke, 112 Mass. 362; City of Peoria v. Johnston, 56 Ill. 45; Driggs v. Phillips, 103 N. Y. 77, 8 N. E. 514; State v. Culver, 65 Mo. 607, 27 Am. Dec. 295; Reilly v. City of Racine, 51 Wis. 526, 8 N. W. 417; Sanborn v. School Dist. No. 10, Rice County, 12 Minn. 17 (Gil. 1); Lathrop v. Central Iowa R. Co., 69 Iowa, 105, 28 N. W. 465.

<sup>78</sup> Hohmann v. City of Chicago, 41 Ill. App. 41.

<sup>79</sup> Dries v. City of St. Joseph, 98 Mo. App. 611, 73 S. W. 723.

ingress and egress to and from his property for himself and animals and goods, even though he may thereby cause temporary inconvenience to the public in general.<sup>80</sup> The convenient use of property, in urban communities, is dependent upon connections with sewer, water, and gas pipes. For these the owner himself must pay. The property is subject to contribution of its share of the cost of building sidewalks and pavements in front of it.<sup>81</sup> All these are necessary to the enjoyment of his property, and are as much property as is the land itself, and equally within constitutional protection.<sup>82</sup>

<sup>80</sup> Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Story's Case, 90 N. Y. 122, 43 Am. Rep. 146; ZIMMERMAN v. METROPOLITAN ST. R. CO., 154 Mo. App. 296, 134 S. W. 40, Cooley, Cas. Mun. Corp. 269.

Owners of property abutting on an alley have property rights not shared by the general public in the entire alley, and the obstruction of a terminus of the alley by the city, thus preventing egress and ingress from the street, is an actionable private wrong. Dries v. St. Joseph, 98 Mo. App. 611, 73 S. W. 723. But the mere fact that an obstruction in a street causes inconvenience in getting from the street in front of his house to a particular part of the city does not constitute such special damage as to entitle the owner to an injunction. Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305. And see Henderson v. City of Minneapolis, 32 Minn. 319, 20 N. W. 322.

It has been held that an abutting owner may maintain injunction proceedings to prevent the obstruction of a public street, he having an especial interest therein because the street makes his property a corner lot, and affords him access to the sides and rear thereof. Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260.

See Davis v. City of Appleton, 109 Wis. 580, 85 N. W. 515; City of Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; Donahue v. Keystone Gas Co., 90 App. Div. 386, 85 N. Y. Supp. 478 (shade trees destroyed by escaping gas); Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275; Village of Winnetka v. Chicago & M. Electric R. Co., 107 Ill. App. 117; Id., 204 Ill. 297, 68 N. E. 407; Young v. Rothrock, 121 Iowa, 588, 96 N. W. 1105; Same v. Chadima Bros., Id.; Montgomery City Council v. Parker, 114 Ala. 118, 21 South. 452, 62 Am. St. Rep. 95.

An abutting owner may place steps, stepping stones, hitching posts, and awning posts on the highway. Louth v. Thompson, 1 Pennewill (Del.) 149, 39 Atl. 1100.

But see West v. Bancroft, 32 Vt. 367.

<sup>81</sup> 2 Dill. Mun. Corp. § 656a.

<sup>82</sup> First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46; Story v. New York

*Vaults under Sidewalks*

If the fee of the street is in the abutting owner, it is held that he has right to excavate under the walk,<sup>83</sup> subject to municipal regulations, and to use space there for such purposes as do not interfere with full and complete use of the street by the public.<sup>84</sup> If the fee to the street belongs to the municipality, this right may be conceded to the abutter under like conditions.<sup>85</sup> Whether his right in such case is equal to that when he owns the fee to the street is not definitely established by the decisions of the courts.<sup>86</sup> This is true even in New York, where the rights of the abutting owner have been most repeatedly and thoroughly litigated.<sup>87</sup> Whatever the rights of the abutter may be in either instance, they must be held by him subject to the paramount rights of the public,

El. R. Co., 90 N. Y. 122, 43 Am. Dec. 146; *Lahr v. Metropolitan E. Ry. Co.*, 104 N. Y. 268, 10 N. E. 528.

The occupants of a building abutting upon a sidewalk are entitled to have the light and air pass unobstructed across the open space between the surface of the sidewalk and the sky. *John Anisfield Co. v. Edward B. Grossman & Co.*, 98 Ill. App. 180.

See *TOWNSEND v. EPSTEIN*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441, Cooley, Cas. Mun. Corp. 254.

<sup>83</sup> *First Nat. Bank of Montgomery v. Tyson*, *supra*; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Davis v. City of Clinton*, 50 Iowa, 588; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Papworth v. City of Milwaukee*, 64 Wis. 389, 25 N. W. 431. See *Deshong v. City of New York*, 74 App. Div. 234, 77 N. Y. Supp. 563.

<sup>84</sup> *Heineck v. Grosse*, 99 Ill. App. 441; *Adair v. City of Atlanta*, 124 Ga. 288, 52 S. E. 739; *Dell Rapids Mercantile Co. v. City of Dell Rapids*, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783; *Louth v. Thompson*, 1 Pennewill (Del.) 149, 39 Atl. 1100; *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *Gridley v. City of Bloomington*, 68 Ill. 50; *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498.

<sup>85</sup> *Tied. Mun. Corp. § 298*.

<sup>86</sup> *Nelson v. Godfrey*, 12 Ill. 22; *Gridley v. City of Bloomington*, *supra*.

<sup>87</sup> *Robert v. Sadler*, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Deshong v. City of New York*, 74 App. Div. 234, 77 N. Y. Supp. 563.

which are not confined to the right of travel, only, but extend to all legitimate street uses, both above and below the surface, which the public welfare may require.<sup>88</sup>

#### *Lateral Support*

An abutting owner has at common law no right to lateral support of street soil,<sup>89</sup> and none can be acquired by prescription or lapse of time;<sup>90</sup> and, though the street grade may be changed so that his fences fall, he has no action therefor.<sup>91</sup> Nor can an abutting owner be compelled to repair sidewalks or streets in front of his property in absence of statutory provision, no liability for such repair existing at common law.<sup>92</sup>

#### *Additional Burdens—Compensation*

If additional burdens are imposed upon a street, abutting owners are entitled to compensation, if damaged; and this notwithstanding the fee is in the public, or the municipality for public use.<sup>93</sup> But "there must be an injury to the present use and enjoyment of the land." So it is held that they may recover damages for the construction of a common traffic rail-

<sup>88</sup> *Allen v. City of Jersey City*, 53 N. J. Law, 522, 22 Atl. 257; *Louth v. Thompson*, 1 Pennewill (Del.) 149, 39 Atl. 1100.

<sup>89</sup> *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Taylor v. City of St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; *Castleberry v. City of Atlanta*, 74 Ga. 164; *City of Quincy v. Jones*, 76 Ill. 281, 20 Am. Rep. 243.

<sup>90</sup> *Mitchell v. Mayor, etc., of City of Rome*, 49 Ga. 19, 15 Am. Rep. 669.

<sup>91</sup> *City of Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73.

<sup>92</sup> *Village of Fulton v. Tucker*, 3 Hun (N. Y.) 529; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358.

<sup>93</sup> *Theobold v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564.

Where a city erects buildings in a street without authority, an abutting property owner injured by the nuisance so caused is entitled to maintain an action against the city to abate the nuisance, and recover damages occasioned thereby. *Pettit v. Grand Junction, Greene County*, 119 Iowa, 352, 93 N. W. 381.

In the erection of telegraph and telephone lines, those exercising the franchise may be compelled to pay damages to the abutting owners. *Patton v. City of Chattanooga*, 108 Tenn. 197, 65 S. W. 414.

road,<sup>94</sup> but not for a mere street railway, whether operated by cable, electric, or horse power.<sup>95</sup>

### *Balconies, Awnings, and Other Projections*

The abutter has no right to project his buildings, or any part thereof or attachment thereto, over the street line, without municipal consent;<sup>96</sup> but a city may permit abutters to extend balconies, bay windows, awnings, or signs into

<sup>94</sup> Ruttell v. City of Covington, 10 Ky. Law Rep. 766, 10 S. W. 644; Perry v. New Orleans, M. & C. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Imlay v. Union Branch R. Co., 26 Conn. 249, 68 Am. Dec. 392; Nicholson v. New York & N. H. R. Co., 22 Conn. 74, 56 Am. Dec. 390; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Lexington & O. R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Inhabitants of Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 71; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215 (Gil. 188); Southern Pac. R. Co. v. Reed, 41 Cal. 256.

In People v. Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304, it was held that a municipality has no power to authorize by ordinance the construction by a private citizen of a projection extending into the street in front of his property for any distance—even the smallest—so as to deprive the public of their right to the use of the street in its entirety.

<sup>95</sup> Kennelly v. City of Jersey City, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; Hine v. Keokuk & D. M. R. Co., 42 Iowa, 636; Stewart v. Chicago General St. Ry. Co., 58 Ill. App. 446; Merrick v. Intramontaine R. Co., 118 N. C. 1081, 24 S. E. 667; Elliott v. Fair Haven & W. R. Co., 32 Conn. 579; Hobart v. Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461; Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542; Savannah & T. R. Co. v. Mayor, etc., of City of Savannah, 45 Ga. 602; Brown v. Duplessis, 14 La. Ann. 842; Hiss. v. Baltimore & H. Pass. Ry. Co., 52 Md. 242, 36 Am. Rep. 371.

<sup>96</sup> Young v. Rothrock, 121 Iowa, 588, 96 N. W. 1105; Same v. Chadima Bros., Id., where an ice chute across a street was held to be a nuisance. See Broadbelt v. Loew, 15 App. Div. 343, 44 N. Y. Supp. 159; First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 30 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46; City of Valparaiso v. Bozarth, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487. But where a statute authorizes the construction, the city has no authority to prohibit it. French v. Inhabitants of Brunswick, 21 Me. 29, 38 Am. Dec. 250; City of Allegheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649; Hawkins v. Sanders, 45 Mich. 491, 8 N. W. 98; Day v. Milford, 5 Allen (Mass.) 98; Bohen v. City of Waseca, 32 Minn. 176,

streets; <sup>97</sup> and it has been held that in such case an adjoining property owner may not maintain an action for inconvenience suffered by him therefrom.<sup>98</sup>

## SEWERS

### 111. The construction of sewers is an inherent municipal function for sanitary purposes, and may be imperatively imposed upon a municipality by the state.

The power and duty of the municipality in preserving the public health often require the construction of a sewer system for the use of the citizens, and, in commenting upon the famous Detroit Park Case, Judge Dillon argues that the legislature would have authority to compel the construction of a sewerage system for the benefit of the city.<sup>99</sup> But whether this is a governmental or municipal power and duty is not clear from the decisions of the courts, some opinions suggesting that, as a part of the high duty of preserving the public

19 N. W. 730, 50 Am. Rep. 564; *Jones v. City of Boston*, 104 Mass. 75, 6 Am. Rep. 194.

<sup>97</sup> *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; *Ivins v. Inhabitants of City of Trenton*, 68 N. J. Law, 501, 53 Atl. 202; *Id.*, 69 N. J. Law, 451, 55 Atl. 1132.

But where a property owner conducted stores on opposite sides of the street, and built a passway over the street connecting the two stores, the ordinance authorizing such construction was held invalid. *TOWNSEND v. EPSTEIN*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441, *Cooley, Cas. Mun. Corp.* 254.

<sup>98</sup> *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597; *Salisbury v. Andrews*, 128 Mass. 336.

But see *John Anisfield Co. v. Edward B. Grossman & Co.*, 98 Ill. App. 180.

If his means of egress and ingress from and to his property are obstructed, he may maintain a suit against the person erecting the construction for its removal. *Bourbon Stock Yard Co. v. Wooley*, 25 Ky. Law Rep. 477, 76 S. W. 28.

<sup>99</sup> 1 Dill. *Mun. Corp.* § 73.

health, it is governmental,<sup>1</sup> while others indicate that it is municipal, as being for the special benefit of the people of the municipality.<sup>2</sup> Certain is it that the power is an important one, and is universally exercised in all the larger and many of the smaller cities.

#### *Municipal Discretion—Extraterritorial Acquisition*

Unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of sewers, and also the nature and cost of the system.<sup>3</sup> This function is legislative, and the municipality cannot be held liable for failure to exercise it, and thus provide a system of its own,<sup>4</sup> or for mistake made in the choice of the systems offered.<sup>5</sup> Usually this power is held, as we have heretofore seen,<sup>6</sup> to be confined to the municipal boundaries; but it is often expressly permitted to the municipality to acquire property outside its limits for obtaining an outlet for its sewerage system, and it has been held that this power to obtain an extraterritorial outlet may be implied from the power to construct such system.<sup>7</sup>

<sup>1</sup> *Cochrane v. City of Malden*, 152 Mass. 365, 25 N. E. 620; *Noble v. Village of St. Albans*, 56 Vt. 522; *Springfield v. Spence*, 39 Ohio St. 665; *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135.

<sup>2</sup> *Donahoe v. City of Kansas City*, 136 Mo. 657, 38 S. W. 571; *Ostrander v. City of Lansing*, 111 Mich. 693, 70 N. W. 332; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78.

<sup>3</sup> *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342.

<sup>4</sup> *Mills v. City of Brooklyn*, 32 N. Y. 489; *Henderson v. City of Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *City Council of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

<sup>5</sup> *Mills v. City of Brooklyn*, *supra*; *Perry v. City of Worcester*, 6 Gray (Mass.) 544, 66 Am. Dec. 431; *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409, 3 Am. St. Rep. 70.

<sup>6</sup> *Ante*, § 55.

<sup>7</sup> *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704. It has been held that a city has inherent authority, unless expressly forbidden by its charter, to make contracts and construct works beyond the corporate limits for the discharge of sewage, where

*Eminent Domain*

The municipality may, of course, use the streets for the construction of a sewerage system, and it has been held that it has also the power of eminent domain over other property for this purpose.<sup>8</sup> And this is consistent with the idea that the construction of a sewerage system is a governmental function. But in other cases it has been held that the power of eminent domain can be used for this purpose only when expressly granted to the municipality.<sup>9</sup>

*Expense of Construction—Connection*

It is competent for the city to assess the expense of building a sewerage system for a certain street against the abutting property,<sup>10</sup> and to require all persons residing on the street to connect with the sewer;<sup>11</sup> and it has been held that no property owner can be prevented from tapping a municipal sewer.<sup>12</sup>

such discharge is necessary or manifestly desirable. *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

<sup>8</sup> *Hildreth v. City of Lowell*, 11 Gray (Mass.) 345.

<sup>9</sup> *Allen v. Jones*, 47 Ind. 438.

<sup>10</sup> *Grimmell v. City of Des Moines*, 57 Iowa, 144, 10 N. W. 330; *Hungerford v. City of Hartford*, 39 Conn. 279; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741; *City of Philadelphia v. Tryon*, 35 Pa. 401; *Wright v. City of Boston*, 9 Cush. (Mass.) 233; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86; *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479.

<sup>11</sup> *City of Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 30 South. 446. The requirement for a sewer connection with a dwelling on premises abutting on a sewer in a city is within the power of the local authorities, and this requirement may be anticipated for municipal convenience, and as a necessary police regulation. *Van Wagoner v. City of Paterson*, 67 N. J. Law, 455, 51 Atl. 922.

<sup>12</sup> *Taylor v. City of Austin*, 32 Minn. 247, 20 N. W. 157; *Buchanan v. City of Duluth*, 40 Minn. 402, 42 N. W. 204; *Semple v. Mayor, etc., of City of Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Kranz v. City of Baltimore*, 64 Md. 491, 2 Atl. 908. Right of city to compensation, see *City of Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961; *City of Fergus Falls v. Edison*, 94 Minn. 121, 102 N. W. 218, 70 L. R. A. 238.

*Maintenance*

A sewer being once completed, it is the imperative municipal duty to see that it is properly cared for; and for failure to perform this function the municipality may become liable in damages.<sup>18</sup>

**PARKS**

112. Public parks and squares are proper objects of municipal concern, as means for the promotion of public health and comfort; and property may be acquired and held by a municipality for these recognized public purposes.

Public parks, such as Hyde Park and the Bois de Boulogne, and public squares, such as Trafalgar Square and the Place de la Concorde, have long been recognized and maintained as municipal attractions and conveniences for the inhabitants and sojourners of a city. Modern sanitation has proven them to be not only beautiful and attractive, but useful and necessary as active agents in promoting public health, so that not only in Paris, London, and New York, but in lesser cities, whole squares have been acquired from private owners in districts of congested population, buildings demolished, and the ground prepared for trees, grass, flowers, and shrubs, which are grown there, not merely for ornamental, but sanitary, purposes as well. Recognizing these as an important public use, the states have generally conferred upon municipalities the sovereign power of eminent domain for the purpose of condemning property for the public use in parks and

<sup>18</sup> *Burnett v. City of New York*, 36 App. Div. 458, 55 N. Y. Supp. 893. The sewers of a city are its private property and the general public of the state at large have no interest in them. *Donahoe v. City of Kansas City*, 136 Mo. 657, 38 S. W. 571; *Clay v. City of St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; *City of Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961.

squares, and have often authorized this to be done beyond the limits of the municipal corporation.<sup>14</sup>

### *Municipal Not Governmental Concern*

But though parks and squares are recognized as of public use, they are matters of municipal rather than governmental concern. They interest the people of the city rather than the general public. It has therefore been held that the establishment of parks and squares is within the discretion of the municipality.<sup>15</sup> These cases are not easily reconciled with those which hold that a city may be compelled to construct drains and sewers, which are likewise means for the promotion of municipal health. Various states, however, according to local conditions, very naturally hold different doctrines upon this subject;<sup>16</sup> and the rulings in the manufacturing states of Connecticut and Rhode Island would not probably be in accord with the decisions in agricultural states like Iowa, Mississippi, and Texas. In the celebrated Detroit Park Case, the Supreme Court of Michigan ruled that the state could not compel the city of Detroit to expend money for the purchase and improvement of land for a municipal park, Judge Cooley declaring that "it is a fundamental principle in this state, recognized and perpetuated by express provision of the Constitution, that the people of every hamlet, town, and city of the state are entitled to the benefit of local self-government."<sup>17</sup> The right of home rule is not so strenuously asserted in all

<sup>14</sup> Higginson v. Inhabitants of Town of Nahant, 11 Allen (Mass.) 530; Mayor v. Park Com'rs, 44 Mich. 602, 7 N. W. 180; In re Mayor, etc., of New York, 99 N. Y. 569, 2 N. E. 642; Mills, Em. Dom. §§ 49, 50.

<sup>15</sup> People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>16</sup> David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174; People ex rel. Board of Park Com'rs v. Mayor of Detroit, 29 Mich. 347; People ex rel. McCagg v. Mayor, etc., of City of Chicago, 51 Ill. 17, 2 Am. Rep. 278.

<sup>17</sup> People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, supra.

the states,<sup>18</sup> and it cannot be doubted that in some of them, if the municipality should fail to make proper provision for parks necessary for the health of the people residing in the densely settled districts, the Supreme Court would sustain a legislative act compelling a city, in the interest of the public health, to acquire property for public parks, for the sanitation of this congested population.

*Cannot be Converted to Private Use*

It is obvious that the city may accept land dedicated for public parks and squares, and appropriate money out of the municipal treasury for its improvement. If, by the terms of the dedication, the property is expressly appropriated to these particular uses, the city may not alienate it or convert it to any other purpose, either public or private;<sup>19</sup> but, if an absolute fee is given to the municipality, its power over the property is unlimited for municipal purposes.<sup>20</sup> It has accordingly been held that a city cannot authorize the erection of any private building upon a public square or park—even a railway station or depot<sup>21</sup>—and that a lease of the park for private use is void.<sup>22</sup> Whether a city may use portions of a park for

<sup>18</sup> Perkins v. Slack, 86 Pa. 283; Darlington v. Mayor, etc., of City of New York, 31 N. Y. 164, 88 Am. Dec. 248.

<sup>19</sup> Gilman v. City of Milwaukee, 55 Wis. 328, 13 N. W. 266; City of Jacksonville v. Jacksonville Ry. Co., 67 Ill. 540; Price v. Thompson, 48 Mo. 363; City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185.

<sup>20</sup> Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904, 34 South. 868; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Van Ness v. Washington, 4 Pet. (U. S.) 232, 7 L. Ed. 842.

<sup>21</sup> Mayor, etc., of City of Columbus v. Jaques, 30 Ga. 506; State v. Atkinson, 24 Vt. 448; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839; 16 L. R. A. 145; Northern Pac. Ry. Co. v. Lake, 10 N. D. 541, 88 N. W. 461.

In Boston the construction of the subway necessitated the erection of railway stations on Boston Common, and, in order that this might be done (it being prohibited by statute), a statute was passed authorizing this use of the public property. Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

<sup>22</sup> Mayor, etc., of City of Macon v. Huff, 60 Ga. 221; Reichard v. Flinn, 20 Pa. Co. Ct. R. 129. But see Harter v. City of San Jose,

public streets seems to be unsettled, some of the cases favoring<sup>23</sup> and others opposing<sup>24</sup> that power. The cases may probably be reconciled upon the distinction that ways may be opened through a park for pleasure driving and riding, like Rotten Row in Hyde Park, but they may not be used for traffic purposes.

#### *Monuments and Fountains*

The city has control of the parks and squares, and may permit and provide for, or refuse, in its discretion, the erection of monuments, fountains, art galleries, and zoölogical buildings,<sup>25</sup> and may pass ordinances for the protection of animals and birds therein, whether confined or allowed to roam and range.

#### *Withdrawal of Dedication*

It is a general principle, as we have heretofore seen,<sup>26</sup> that, until acceptance, a common-law dedication may be with-

141 Cal. 659, 75 Pac. 344; *Gushee v. City of New York*, 42 App. Div. 37, 58 N. Y. Supp. 967.

An agreement made by a park commissioner, giving an individual the exclusive privilege of renting chairs in the public parks of a city, under which chairs were substituted for park benches located under the trees, compelling the public to hire chairs, or sit in the sun, is illegal, as being in derogation of public rights. *Kurtz v. Clausen*, 38 Misc. Rep. 105, 77 N. Y. Supp. 97. But see *Huff v. Macon*, 117 Ga. 428, 43 S. E. 708.

<sup>23</sup> *Brodbine v. Revere*, 182 Mass. 598, 66 N. E. 607.

The trustees of a village have a right to inclose a public square so that teams and wagons cannot pass across it. *Guttry v. Glenn*, 201 Ill. 275, 66 N. E. 305.

<sup>24</sup> *Bolster v. Ithaca St. R. Co.*, 79 App. Div. 239, 79 N. Y. Supp. 597; *Seward v. City of Orange*, 59 N. J. Law, 331, 35 Atl. 799.

<sup>25</sup> As to erection of a public building, see *Fessler v. Town of Union*, 67 N. J. Eq. 14, 56 Atl. 272.

<sup>26</sup> *Ante*, § 130. See *Ayres v. Pennsylvania R. Co.*, 52 N. J. Law, 405, 20 Atl. 54; *People v. Kingman*, 24 N. Y. 559; *Forsyth v. Dunnigan*, 94 Cal. 438, 29 Pac. 770.

But a license conferred by a city, permitting another to erect a wall in the street, which, after erection, became a part of the street, did not confer on the licensee any property rights in the street, so as to preclude the city from revoking such license, and requiring the removal of the wall without compensation to such licensee. *South*

drawn; and a dedicator may withdraw his dedication for municipal purposes at any time before the municipality expends money upon the property on the faith of the dedication.<sup>27</sup> But he may not revoke a dedication after the city has made substantial expenditure in pursuance of the object of the dedication.<sup>28</sup>

## PUBLIC BUILDINGS

**113. Public buildings are essential for municipal purposes, and the power to acquire land therefor, and erect and maintain necessary buildings thereon, is inherent in the municipal corporation.**

What may be the necessary buildings for any municipality, or whether any particular building may be appropriate for municipal uses, is largely a matter of fact, dependent upon peculiar municipal conditions; but it is generally conceded that the city council possesses inherent power to provide appropriate room for its own meeting, and for the transaction of the necessary municipal business.<sup>29</sup> It is also obvious that it must provide a proper place for the detention of municipal pris-

*Highland Land & Improvement Co. v. Kansas City*, 100 Mo. App. 518, 75 S. W. 383.

<sup>27</sup> *City of San Francisco v. Canavan*, 42 Cal. 541; *Logan v. Rose*, 88 Cal. 263, 26 Pac. 106; *Tillman v. People*, 12 Mich. 401; *Schmitz v. Village of Germantown*, 31 Ill. App. 284; *Hanson v. Eastman*, 21 Minn. 509; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740.

<sup>28</sup> *Crocket v. City of Boston*, 5 Cush. (Mass.) 182.

The dedicator and the city may jointly arrange to revoke a dedication after acceptance, in case the rights of third persons have not vested by reason of the purchase of lots fronting on the property dedicated. *Municipality No. 3 v. Levee Steam Cotton Press Co.*, 7 La. Ann. 270.

<sup>29</sup> *People ex rel. Menomy v. Harris*, 4 Cal. 9; *Reynolds v. Mayor etc., of City of Albany*, 8 Barb. (N. Y.) 597; *Vanover v. Davis*, 27 Ga. 357; *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715.

oners,<sup>30</sup> and also the proper housing and protection of its fire apparatus; and it has been held, also, that a city school building may be erected without express charter authority.<sup>31</sup> And in general it may be said that the municipality has implied power to erect and maintain any public building which is necessary for the performance of its public functions, though it has been declared that it has no right to incur a debt for such purpose.<sup>32</sup> Usually, however, charter power to acquire necessary land and erect necessary buildings for municipal purposes is expressly conferred, under which these functions are clearly in the municipal discretion.

#### *Implied Power to Furnish and Maintain*

Power to erect and maintain such buildings implies also the power to properly furnish, repair, and otherwise care for them, all of which are likewise within municipal discretion; and this discretion has been held to be absolute in the matter of furnishing and decorating the council room, and an injunction accordingly refused to prevent the council from purchasing and hanging portraits of city fathers upon the walls of the council chamber.<sup>33</sup> Appropriations for municipal buildings and their furnishing have been also contested on the ground of extravagance and public inutility; and it has been held that, if the obvious primary object is to serve some private purpose, the expenditure will be enjoined,<sup>34</sup> even though the public might gain some incidental benefit. But the courts have generally recognized the legislative discretion to determine whether a building is needed,<sup>35</sup> and what expense the city may properly incur therefor, and have therefore refused

<sup>30</sup> Long v. City of Elberton, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363; Felts v. Mayor, etc., of City of Memphis, 2 Head (Tenn.) 650; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

<sup>31</sup> Mayor, etc., of City of Cartersville v. Baker, 73 Ga. 686.

<sup>32</sup> People ex rel. Menomy v. Harris, 4 Cal. 9.

<sup>33</sup> Reynolds v. Mayor, etc., of City of Albany, 8 Barb. (N. Y.) 597.

<sup>34</sup> Bates v. Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

<sup>35</sup> City of Galveston v. Devlin, 84 Tex. 319, 19 S. W. 395; Ely v. City of Rochester, 26 Barb. (N. Y.) 133.

to enjoin appropriations for buildings provided for prospective wants, or otherwise, in which the amount of the expenditure seemed unwise to the court and jury, when it was being made for a necessary municipal purpose.<sup>36</sup>

#### *Municipal Discretion in Erection*

The power of the state to compel the erection of public buildings has been much mooted, and the general tendency of the decisions is to leave such things to the municipal discretion. It has accordingly been held that the city, being the county seat, may be authorized to levy taxes for the erection of county buildings.<sup>37</sup> But in the matter of the magnificent city building of Philadelphia, involving the expenditure of millions of dollars, it was held competent for the Legislature to empower the construction by commissioners "of all public buildings required to accommodate the courts for all the municipal purposes within the city," and to call on the city annually for a sum sufficient to meet the annual estimates on the building. The act also required the city to make assessments to meet these annual requisitions, when it had no voice, except in the Legislature, in determining the character of the building, or the personnel of the construction committee. This strenuous legislation was upheld by the Supreme Court of Pennsylvania over the protest of the city, and the levies compelled by mandamus, even after the Constitution of 1874,<sup>38</sup> adopted pending the erection of the city hall, had forbidden the Legislature "to interfere with any municipal improvement, money, property or effects \* \* \* or to levy taxes, or perform any municipal function whatever," and provided that "no debt shall be contracted or liability incurred by any municipal commission except in pursuance of appropria-

<sup>36</sup> *Torrent v. Muskegon*, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715; *Greenbanks v. Boutwell*, 43 Vt. 207; *Greeley v. People*, 60 Ill. 19; *Spaulding v. City of Lowell*, 23 Pick. (Mass.) 71.

<sup>37</sup> *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677. But a distinction should be noted between permission and compulsion. *Id.*

<sup>38</sup> Art. 3, § 20; art. 15, § 2.

tions previously made by the municipal government," on the ground that this fundamental law did not interfere with existing commissioners, plans, or contracts.<sup>39</sup> The ruling in this case has not met with general approval, and has rarely been followed, the tendency of the courts being to hold that municipal buildings are matters of municipal, rather than governmental, concern.<sup>40</sup>

<sup>39</sup> Perkins v. Slack, 86 Pa. 283.

<sup>40</sup> Callam v. Saginaw, *supra*. STATE ex rel. JAMESON v. DENNY, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4; City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; State v. Seavey, 22 Neb. 455, 35 N. W. 228.

## CHAPTER XII

### TORTS

- 114. Civil Liability.
- 115-117. Governmental and Municipal Duties Distinguished.
- 118. Care of Streets.
- 119. Obstructions.
- 120. Sidewalks.
- 121. Bridges and Viaducts.
- 122. Drains and Sewers.
- 123. Respondeat Superior.
- 124. Ultra Vires.

### CIVIL LIABILITY

- 114. A municipal corporation may be liable to a civil action for a wrong committed or permitted by it causing private injury.

As we have heretofore seen,<sup>1</sup> a municipal corporation may be imposed upon a community against its wish, and its functions prescribed without the consent of the citizens, and thus made an agency of the state for governmental purposes. It is also obvious that the state is not subject to prosecution, nor to action, save by its own consent; and it has been thought anomalous by some that a compulsory agent of the state should be liable either civilly or criminally for trespass or negligence. But we have also seen<sup>2</sup> that<sup>3</sup> a municipality is usually created at the request of the community, and that it exists not only for the public welfare, but also for the benefit of its citizens; that it is in certain aspects a distinct person, and a member of society, and as such is subject to the general law which is "prescribed by the supreme power in the state,"<sup>3</sup> and which any citizen or person violates at peril. A municipality, being not only a public agency, but also a quasi private individual, is therefore subject to the law; and it is too well settled by re-

<sup>1</sup> Ante, § 11.

<sup>2</sup> Ante, § 12.

<sup>3</sup> 1 Bl. Comm. p. 44.

peated adjudication, both in England and America, to admit of question that a municipality for its wrong to the public may be prosecuted, and for its torts against individuals may be sued in civil action for damages like a private corporation.<sup>4</sup>

A municipality, being created by the state and endowed with certain functions for the public welfare, must perform those functions, or suffer indictment for its nonfeasance or misfeasance.<sup>5</sup> Also, being a member of society, and empowered not only to exercise governmental functions, but also to own property and to deal with other corporations and with natural persons upon terms of equality, the municipality must not only respect the law in its contracts, but also in its noncontract relations with others; and where any one suffers an injury by the neglect of the municipality to discharge any absolute duty such person has an action against the municipality for the redress of the injury.<sup>6</sup>

<sup>4</sup> *Rex v. Oxfordshire*, 16 East, 223; *State v. City of Portland*, 74 Me. 268, 43 Am. Rep. 586; *State v. Town of Murfreesboro*, 11 Humph. (Tenn.) 217; *Commonwealth v. City of Newburyport*, 103 Mass. 129; *Barnes v. Dist. of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Worley v. Inhabitants of Town of Columbia*, 88 Mo. 106; *Curran v. Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465; *State v. Shelbyville Corp.*, 4 *Sneed* (Tenn.) 176; *Lloyd v. Mayor, etc., of City of New York*, 5 N. Y. 369, 55 Am. Dec. 347. But see *State v. Town of Burlington*, 36 Vt. 521.

<sup>5</sup> *Commonwealth v. Bredin*, 165 Pa. 224, 30 Atl. 921; *Commonwealth v. Lansford*, 14 Pa. Co. Ct. R. 376; *State v. Shelbyville Corp.*, *supra*; *Commonwealth v. Trustees of Hopkinsville*, 7 B. Mon. (Ky.) 38.

<sup>6</sup> *Kleopfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908; *Rowland v. Superintendents of Poor for Kalamazoo County*, 49 Mich. 553, 14 N. W. 494; *Pennoyer v. City of Saginaw*, 8 Mich. 534; *Worden v. City of New Bedford*, 131 Mass. 23, 41 Am. Rep. 185; *Moulton v. Inhabitants of Scarborough*, 71 Me. 267, 36 Am. Rep. 308.

In Nebraska the liability of a city for injuries caused is exclusively statutory. *Goddard v. City of Lincoln*, 69 Neb. 594, 96 N. W. 273.

## GOVERNMENTAL AND MUNICIPAL DUTIES DISTINGUISHED

115. No action lies at common law against a municipal corporation for an injury resulting from the performance or nonperformance by it of a purely governmental duty.
116. A municipality, in the exercise of its purely municipal functions, is subject to the same rules of liability for torts as a private corporation.
117. A municipality, when charged in its corporate character with the performance of a municipal function in regard to governmental affairs, is, by the preponderance of judicial opinion, civilly liable for injuries resulting from misfeasance or nonfeasance of such municipal duty.

The double nature of the municipal corporation, seen in its purely public and governmental functions on the one side and in its municipal and quasi private functions on the other, calls for the application of different rules of law as to the effect of its corporate acts upon natural persons and other corporations. In its purely governmental character a municipality closely resembles a quasi corporation, and in this aspect the law for it is practically the same as for a quasi corporation as to the reason and extent of its exemption from liability for injuries suffered by others.<sup>7</sup> It is performing a public function—dis-

<sup>7</sup> KANSAS CITY v. LEMEN, 57 Fed. 905, 6 C. C. A. 627, Cooley, Cas. Mun. Corp. 275; Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; Nicholson v. City of Detroit, 126 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Fisher v. City of New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; Rose v. City of Toledo, 24 Ohio Cir. Ct. R. 540; Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Welsh v. Village of Rutland, 56 Vt. 228, 48 Am. Rep. 762; Mayor, etc., of City of Helena v. Thompson, 29 Ark. 569; City of Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705.

charging a governmental duty of the state for the public welfare; and out of this no action can arise unless given by statute.<sup>8</sup> The line separating governmental from municipal duties cannot always be plainly seen; but there are certain functions performed by municipal corporations which are confessedly public, out of which no private action can arise, not only because the state is sovereign and the municipality its agent,<sup>9</sup> but also for the reason that the constant fear of liability for damages while acting for the public welfare would prevent proper performance of these public functions by the corporation.

#### *Public Functions*

Prominent among these governmental functions are: (1) The preservation of the public peace; (2) the preservation of the public health; (3) punishment of criminals; (4) preventing destruction by fire; (5) furnishing public education; (6) providing for the poor. Accordingly, it is held that a city is not liable for negligence or misconduct of its police officers,<sup>10</sup>

<sup>8</sup> Hickox v. City of Cleveland, 8 Ohio, 543, 32 Am. Dec. 730; Stewart v. City of New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218; City of Richmond v. Long's Adm'r's, 17 Grat. (Va.) 375, 94 Am. Dec. 461; Prather v. City of Lexington, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585; Danaher v. City of Brooklyn, 51 Hun, 563, 4 N. Y. Supp. 312; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810.

<sup>9</sup> Dargan v. Mayor, etc., of City of Mobile, 31 Ala. 469, 70 Am. Dec. 508; Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. Ed. 719; City of Anderson v. East, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35; Forsyth v. Mayor, etc., of City of Atlanta, 45 Ga. 152, 12 Am. Rep. 576; Harman v. City of St. Louis, 137 Mo. 494, 38 S. W. 1102; Beers, use of Platenius, v. Arkansas, 20 How. (U. S.) 527, 15 L. Ed. 991.

<sup>10</sup> City of Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; KANSAS CITY v. LEMEN, 57 Fed. 905, 6 C. C. A. 627, Cooley, Cas. Mun. Corp. 275; Betham v. City of Philadelphia, 196 Pa. 302, 46 Atl. 448; Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Lahner v. Incorporated Town of Williams, 112 Iowa, 428, 84 N. W. 507; Caldwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; Easterly v. Incorporated Town of Irwin, 99 Iowa, 694, 68 N. W. 919; McAuliffe v. City of Victor, 15 Colo. 337, 62 Pac. 231; Brown's Adm'r v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; La Clef v. City of Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St.

for they are state officers, rather than municipal; and that it is not liable for failure to disperse a mob or suppress a riot.<sup>11</sup> Nor is a city liable for the misconduct of its health department, or any of its health officers,<sup>12</sup> since sanitation is

Rep. 285; *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; *Corning v. City of Saginaw*, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332; *White v. Board of Com'rs of Sullivan County*, 129 Ind. 396, 28 N. E. 846; *Davis v. Knoxville*, 90 Tenn. 599, 18 S. W. 254; *Perkins v. City of New Haven*, 53 Conn. 214, 1 Atl. 825; *Taylor v. City of Owensboro*, 98 Ky. 271, 32 S. W. 948, 56 Am. St. Rep. 361; *Pollock's Adm'r v. Louisville*, 13 Bush (Ky.) 221, 26 Am. Rep. 260; *Culver v. City of Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *McElroy v. City Council of Albany*, 65 Ga. 387, 38 Am. Rep. 791; *Whitfield v. City of Paris*, 84 Tex. 431, 19 S. W. 566, 15 L. R. A. 783, 31 Am. St. Rep. 69; *Peck v. City of Austin*, 22 Tex. 261, 73 Am. Dec. 261; *Kies v. City of Erie*, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867; *Twyman's Adm'rs v. Board of Council of Frankfort*, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572, 4 Ann. Cas. 622.

Police officers appointed by a city in obedience to a statute are not agents or servants for whose torts the city will be liable under the rule of *respondeat superior*. *Woodhull v. City of New York*, 150 N. Y. 450, 44 N. E. 1038.

<sup>11</sup> *Gianfortone v. City of New Orleans* (C. C.) 61 Fed. 64, 24 L. R. A. 592; *Hart v. Bridgeport*, 13 Blatchf. (U. S.) 289, Fed. Cas. No. 6,149; *Prather v. City of Lexington*, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585; *Chicago League Ball Club v. City of Chicago*, 77 Ill. App. 124; *Bartlett v. Town of Clarksburg*, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817; *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375.

But a state may constitutionally compel its counties and cities to indemnify against loss of property arising from mobs and riots. *Pennsylvania Co. v. City of Chicago* (C. C.) 81 Fed. 317; *Spring Val. Coal Co. v. Spring Valley*, 65 Ill. App. 571; *City of Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198; *Adams v. City of Salina*, 58 Kan. 246, 48 Pac. 918; *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509; *Underhill v. City of Manchester*, 45 N. H. 214; *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936.

<sup>12</sup> *City of Dalton v. Wilson*, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101; *Gilboy v. City of Detroit*, 115 Mich. 121, 73 N. W. 128; *Wyatt v. City of Rome*, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. Rep. 41; *Tollefson v. City of Ottawa*, 228 Ill. 134, 81 N. E. 823, 11 L. R. A. (N. S.) 990; *Summers v. County of Daviess*, 103 Ind.

a public, rather than a municipal, duty. And since the maintenance of public peace and enforcement of good order may require the punishment of evildoers by a municipality, it is the general doctrine that no action will lie against the corporation for the negligence or misconduct of its officers in the confinement or punishment of criminals;<sup>13</sup> but it has been intimated in North Carolina,<sup>14</sup> and held in Virginia,<sup>15</sup> that a city or town may be liable for failure to keep its jail or calaboose in proper condition and under the care of competent servants. Though it is not so plainly seen to be for the public

262, 2 N. E. 725, 53 Am. Rep. 512; *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; *Ogg v. City of Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Bryant v. City of St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Whitfield v. City of Paris*, 84 Tex. 431, 19 S. W. 566, 15 L. R. A. 783, 31 Am. St. Rep. 69.

A city is not liable for the trespass of its mayor, police officers, and city physician in quarantining and detaining a body of yellow fever suspects in a hotel. *City of San Antonio v. White* (Tex. Civ. App.) 57 S. W. 858.

A municipal corporation is not liable for the value of property destroyed by mistake on the order of its health officers. *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983, 1 Ann. Cas. 341.

<sup>13</sup> *La Clef v. City of Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *Royce v. Salt Lake City*, 15 Utah, 401, 49 Pac. 290; *Nisbett v. City of Atlanta*, 97 Ga. 650, 25 S. E. 173; *Curran v. City of Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812.

A city, in constructing and maintaining a workhouse, acts in a governmental, not a municipal, capacity, and is not, therefore, liable for injuries received by a prisoner through the wrongful acts of the workhouse overseer. *Rose v. City of Toledo*, 24 Ohio Cir. Ct. R. 540.

<sup>14</sup> *Shields v. Town of Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293; *Coley v. City of Statesville*, 121 N. C. 301, 28 S. E. 482.

<sup>15</sup> *Edwards v. Town of Pocahontas* (C. C.) 47 Fed. 268.

In erecting and maintaining a city prison the municipality is exercising a purely governmental function. *Gray v. City of Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131.

*Contra, Blake v. City of Pontiac*, 49 Ill. App. 543. See, also, *Snider v. City of St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; *Eddy v. Village of Ellicottville*, 35 App. Div. 256, 54 N. Y. Supp. 801.

welfare, rather than for the benefit of the citizens of the municipality, that fires should be extinguished and private property saved, yet the courts agree that it is a governmental duty to stop conflagrations, and that a municipality cannot be held liable for either the negligence or misconduct of its fire department, or any member thereof;<sup>16</sup> also that a city cannot be held liable for the failure to provide adequate fire apparatus or sufficient water to extinguish fire,<sup>17</sup> though a city has been held liable to an engineer for its negligence in putting him

<sup>16</sup> Wheeler v. City of Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35; Davis v. City of Lebanon, 108 Ky. 688, 57 S. W. 471; CUNNINGHAM v. CITY OF SEATTLE, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629, Cooley, Cas. Mun. Corp. 280, rehearing denied 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805; Fisher v. City of Boston, 104 Mass. 87, 6 Am. Rep. 196; Jewett v. City of New Haven, 38 Conn. 368, 9 Am. Rep. 382; Grant v. City of Erie, 69 Pa. 420, 8 Am. Rep. 272; Hayes v. City of Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Heller v. Mayor, etc., of Sedalia, 53 Mo. 159, 14 Am. Rep. 444; Greenwood v. Louisville, 13 Bush (Ky.) 226, 26 Am. Rep. 263; Robinson v. City of Evansville, 87 Ind. 334, 44 Am. Rep. 770; Wilcox v. City of Chicago, 107 Ill. 337, 47 Am. Rep. 434; Welsh v. Village of Rutland, 56 Vt. 228, 48 Am. Rep. 762; Burrill v. Augusta, 78 Me. 118, 3 Atl. 177, 57 Am. Rep. 788; Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. 228.

While driving along the street a horse was frightened by an employé of the fire department and ran away. The city was sued to recover damages, but it was held that there could be no recovery, as the employés of the fire department were public officers engaged in a public duty. Saunders v. City of Ft. Madison, 111 Iowa, 102, 82 N. W. 428; Lawson v. City of Seattle, 6 Wash. 184, 33 Pac. 347; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781, 33 Am. St. Rep. 901.

<sup>17</sup> Mendel v. City of Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; Tainter v. City of Worcester, 123 Mass. 311, 25 Am. Rep. 90; Akin v. Akin, 78 Ga. 24, 1 S. E. 267; Heller v. Mayor, etc., of Sedalia, 53 Mo. 159, 14 Am. Rep. 444; Wheeler v. City of Cincinnati, *supra*; Vanhorn v. City of Des Moines, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; Grant v. City of Erie, *supra*; Foster v. Lookout Water Co., 3 Lea (Tenn.) 42; Witheril v. Mosher, 9 Hun (N. Y.) 412.

The power resting in a municipality to provide for a supply of water is, in its nature, legislative and governmental, and, if not ex-

to work upon a defective engine.<sup>18</sup> So, also, it is held that no action will lie against a municipality for injury resulting from the negligence or misconduct of any of its agents or employés in connection with its public school buildings;<sup>19</sup> but, notwithstanding the numerous adjudications to this effect, it is plausibly contended that where a city with sufficient funds is charged with proper care of its school property it ought to be liable for failure to provide a safe place for teachers and pupils.<sup>20</sup> Whenever a city is charged with the duty of caring for the poor, no private action can be maintained against it for misfeasance or nonfeasance in the performance of this function;<sup>21</sup> it is a public charity, governmental in its character, and no liability against the city will arise out of this relation.<sup>22</sup> It has repeatedly been adjudged also that no private action will lie against the city either for failure to enforce its own laws and ordinances,<sup>23</sup> or from its

ercised, and in consequence loss results to property owners by fires, the municipality is not liable for damages. *Planters' Oil Mill v. Monroe Waterworks & Light Co.*, 52 La. Ann. 1243, 27 South. 684. See *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*, 6 Misc. Rep. 233, 26 N. Y. Supp. 1094. But see *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*, 80 Hun, 162, 29 N. Y. Supp. 1130.

<sup>18</sup> *City of Lafayette v. Allen*, 81 Ind. 166.

<sup>19</sup> *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Howard v. City of Worcester*, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160, 25 Am. St. Rep. 651. Contra, *McCaughhey v. Tripp*, 12 R. I. 449.

<sup>20</sup> *Briegel v. City of Philadelphia*, 135 Pa. 451, 19 Atl. 1038, 20 Am. St. Rep. 885.

<sup>21</sup> *Neff v. Inhabitants of Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500; *Maxmilian v. Mayor*, etc., of City of New York, 62 N. Y. 160, 20 Am. Rep. 469; *Curran v. City of Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465.

<sup>22</sup> *Maxmilian v. Mayor*, etc., of City of New York, *supra*; *Benton v. Boston City Hospital*, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; *City of Richmond v. Long's Adm'rs*, 17 Grat. (Va.) 375, 94 Am. Dec. 461.

<sup>23</sup> *Davis v. City Council of Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *ADDINGTON v. TOWN OF LITTLETON*, 50 Colo. 623, 115 Pac. 896, 34 L. R. A. (N. S.) 1012, Ann. Cas. 1912C, 753; *Cooley Cas. Mun. Corp.* 279; *Marth v. City of Kingfisher*, 22 Okl. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238; *Miller & Meyers v. City of Newport*

action or nonaction in any other matter resting in the discretion of the corporation as a governmental agency;<sup>24</sup> and so damages have been refused for injuries resulting from forbidden fireworks,<sup>25</sup> from a public nuisance,<sup>26</sup> for failure to build sewers or drains,<sup>27</sup> from the adoption of a defective plan of sewerage,<sup>28</sup> and from doing or failing to do any act not min-

News, 101 Va. 432, 44 S. E. 712; Wheeler v. City of Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; Harman v. City of St. Louis, 137 Mo. 494, 38 S. W. 1102; Levy v. City of New York, 1 Sandf. (N. Y.) 465; Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. Ed. 719; Trammell v. Town of Russellville, 34 Ark. 105, 36 Am. Rep. 1; Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Tarbutton v. Town of Tennille, 110 Ga. 90, 35 S. E. 282; Ball v. Town of Woodbine, 61 Iowa, 83, 15 N. W. 846, 47 Am. Rep. 805.

<sup>24</sup> Bürford v. City of Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105; Mills v. City of Brooklyn, 32 N. Y. 489; Moore v. City of Cape Girardeau, 103 Mo. 470, 15 S. W. 755; Smith v. Selinsgrove, 199 Pa. 615, 49 Atl. 213.

<sup>25</sup> McDade v. City of Chester, 117 Pa. 414, 12 Atl. 421, 2 Am. St. Rep. 681.

A city is not liable for injuries caused by a discharge of fireworks because the city authorities suspended, for the day of the accident, an ordinance forbidding the discharge of fireworks. Fifield v. Common Council of Phoenix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430. But see Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664, where the city was held liable. See, also, Landau v. New York, 90 App. Div. 50, 85 N. Y. Supp. 616.

<sup>26</sup> McCrowell v. Mayor, etc., of Town of Bristol, 5 Lea (Tenn.) 685; Arnold v. City of Stamford, 113 Ky. 852, 69 S. W. 726; Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598.

A city is not liable for permitting a nuisance to exist on private property within its limits. Board of Councilmen of Frankfort v. Commonwealth, 25 Ky. Law Rep. 311, 75 S. W. 217. See City of Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830; Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824; Hill v. City of New York, 139 N. Y. 495, 34 N. E. 1090; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504.

<sup>27</sup> Horton v. Mayor, etc., of City of Nashville, 4 Lea (Tenn.) 47, 40 Am. Rep. 1; Wakefield v. Newell, supra.

<sup>28</sup> Child v. City of Boston, 4 Allen (Mass.) 41, 81 Am. Dec. 680; Johnston v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; Mills v. City of Brooklyn, 32 N. Y. 489.

isterial, but legislative or judicial, in its character.<sup>29</sup> This exemption from liability is based, like the former one, upon the idea that the decision of this question is the performance of a governmental function.

#### *Same—Statutory Liability*

Action may be given by statute for injuries resulting from any of the foregoing causes, and for some of them the right exists at present in some of the states. The measure and extent of this right can be determined only by consulting the state statutes. But exemption from private action does not imply exemption from public prosecution, as municipal corporations are generally regarded as indictable for misfeasance and nonfeasance of public functions obviously enjoined for the public welfare.<sup>30</sup>

#### *Municipal Functions*

It is in the field of torts that the dual nature of the municipal corporation becomes most conspicuous. In one aspect, as we have seen, the municipality confessedly occupies the attitude of a sovereign, and enjoys sovereign exemption from liability for injuries resulting from its acts and omissions. The courts also concur in deciding that in its other aspect as a corporation exercising solely municipal functions it is subject to the same rules of liability for torts as a private corporation.<sup>31</sup>

<sup>29</sup> City of Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507; Terry v. City of Richmond, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834; Stevens v. City of Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

<sup>30</sup> 1 McClain, Cr. Law, § 183; McCowell v. Bristol, *supra*, note 26; People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Mayor, etc., of Town of Chattanooga v. State, 5 Sneed (Tenn.) 578; State v. Mayor, etc., of Town of Murfreesboro, 11 Humph. (Tenn.) 217; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Brayton v. City of Fall River, 113 Mass. 218, 18 Am. Rep. 470.

<sup>31</sup> Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Meares v. Commissioners of Town of Wilmington, 31 N. C. 73, 49 Am. Dec. 412; City of Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Welsh v. Village of Rutland, 56 Vt. 228, 48 Am. Rep. 762; 2 Thomp. Neg. p. 738.

These rules are thus stated by Mr. Clark: "A private corporation is liable for the torts of its servants and agents committed in the course of their employment to the same extent as a natural person would be. And it may be liable for wrongs involving a mental element—as malicious wrongs, frauds, etc.; but it cannot commit a tort like slander, which, from its nature, cannot be committed by deputy."<sup>32</sup> This rule of liability prevails against a municipal corporation in regard to those duties which arise from the grant of a special power to be used for quasi private purposes,<sup>33</sup> in the exercise of which the municipality is a corporate person, a member of society, and not a governmental agency.

#### *Same—Municipal Property and Business*

In an early New York case,<sup>34</sup> which has been quoted with approval both in England and America, the doctrine of liability of a municipality in regard to its quasi private real property was thus stated: "The citizen and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality. Neither is the privileged owner, and each must fulfill the same duties in respect to the other." This rule has been applied to a poor farm<sup>35</sup> kept by a municipality, and also to a city cemetery<sup>36</sup> yielding profit to the municipality.

<sup>32</sup> Clark, *Priv. Corp.* § 69. See *Howland v. Inhabitants of Maynard*, 159 Mass. 434, 34 N. E. 515, 21 L. R. A. 500, 38 Am. St. Rep. 445.

<sup>33</sup> *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244; *City of Chicago v. Selz Schwab & Co.*, 104 Ill. App. 376, affirmed 202 Ill. 545, 67 N. E. 386. See, also, *Bailey v. Mayor*, etc., of *City of New York*, *supra*; *Baumgard v. Mayor*, etc., of *City of New Orleans*, 9 La. 119, 29 Am. Dec. 437; *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Hunt v. City of Boonville*, 65 Mo. 620, 27 Am. Rep. 299; *Thayer v. City of Boston*, 19 Pick. (Mass.) 511, 31 Am. Dec. 137; *Mitchell v. City of Rockland*, 41 Me. 363, 66 Am. Dec. 252.

<sup>34</sup> *Bailey v. Mayor*, etc., of *City of New York*, *supra*.

<sup>35</sup> *Moulton v. Inhabitants of Scarborough*, 71 Me. 267, 36 Am. Rep. 308. But see *Maxmilian v. Mayor*, etc., of *City of New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Neff v. Inhabitants of Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

<sup>36</sup> *City of Toledo v. Cone*, 41 Ohio St. 149.

The same rule has also been applied to a municipality owning or controlling wharves, docks, and piers.<sup>37</sup> This rule applies also where the city supplies water<sup>38</sup> or light<sup>39</sup> for compensation, and so where it maintains a public market.<sup>40</sup> In a leading New York Case<sup>41</sup> Chief Justice Nelson, speaking of the municipal power to construct and maintain waterworks for municipal use, declared: "If the grant is for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred." And this rule seems to apply to any business undertaken by a municipality under its charter powers.<sup>42</sup> It is a corporation for profit, and justly subject to the same rules as a private corporation.

<sup>37</sup> *Seaman v. Mayor, etc., of City of New York*, 80 N. Y. 239, 36 Am. Rep. 612; *City of Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *City of Jeffersonville v. Louisville & J. Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495; *City of Petersburg v. Applegarth's Adm'r*, 28 Grat. (Va.) 321, 26 Am. Rep. 357; *Mayor, etc., of City of Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133; *Manhattan Transp. Co. v. City of New York* (D. C.) 37 Fed. 160; *Smith v. Havemeyer* (C. C.) 36 Fed. 927; *Barber v. Abendroth*, 102 N. Y. 406, 7 N. E. 417, 55 Am. Rep. 821; *Augusta City Council v. Hudson*, 88 Ga. 599, 15 S. E. 678; *Id.*, 94 Ga. 135, 21 S. E. 289 (as to toll bridge); *Whitfield v. Town of Carrollton*, 50 Mo. App. 98; *The Giovanni v. City of Philadelphia* (D. C.) 59 Fed. 303 (tug boat).

<sup>38</sup> *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 386; *City Council of Augusta v. Lombard*, 99 Ga. 282, 25 S. E. 772; *Whitfield v. Town of Carrollton*, 50 Mo. App. 98; *Bailey v. Mayor, etc., of City of New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Stock v. City of Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434.

<sup>39</sup> *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Bodge v. City of Philadelphia*, 167 Pa. 492, 31 Atl. 728.

<sup>40</sup> *Mayor, etc., of City of Savannah v. Collens*, 38 Ga. 334, 95 Am. Dec. 398; *Town of Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640.

<sup>41</sup> *Bailey v. Mayor, etc., of City of New York*, 3 Hill, 531, 38 Am. Dec. 669.

<sup>42</sup> 2 *Thomp. Neg.* p. 738.

*Municipal Performance of Governmental Duty*

A real difficulty arises when we come to consider the liability of the municipality for misfeasance or nonfeasance in relation to duties of a governmental character, with the performance of which the municipality has been charged in its corporate capacity. Here we enter the disputed boundary of municipal torts. In the field of solely governmental duties the law is plain and well recognized. In the performance of strictly governmental functions the municipality cannot commit a tort. Equally well settled is it that in matters of strictly municipal concern a municipality is subject to the same law as a private corporation. But in the border land between these two open fields, where the dual nature of a municipality appears in both phases, unnumbered contests have occurred over the legal effect of municipal nonfeasance, misfeasance, and even malfeasance, which have been variously decided in America; so that it may well be said that the law on this subject is unsettled; the boundary line of liability is not established.<sup>43</sup> The prolific source of contention in this border land has been the municipal control of streets and sewers. The public highways are the special care of the state, inside as well as outside our cities and towns. They are for public use and public convenience, not for local or municipal benefit. Especially is this true of the great thoroughfares of a city or town. Some courts have classified sewers with streets,<sup>44</sup> though it is obvious that the municipal interest and benefit far exceeds that of the public in the sewers and drains of the city. Both streets and sewers, however, are usually placed under the special care and control of the municipality. The state delegates this public function to the local corporation, and the bone of contention has been whether the mu-

<sup>43</sup> 2 Dill. Mun. Corp. §§ 961-971; *City of Omaha v. Croft*, 60 Neb. 59, 82 S. W. 120; *McGinnis v. Inhabitants of Medway*, 176 Mass. 67, 57 N. E. 210.

<sup>44</sup> *Whipple v. Village of Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Ashley v. City of Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; *Rowe v. City of Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464.

nicipality, in caring for streets and sewers, is performing a governmental or municipal function; or, practically stated, the question is whether it may become liable for tort in regard to these governmental affairs.<sup>45</sup>

### CARE OF STREETS

**118. The common law requires every municipal corporation to exercise reasonable care to make and keep its streets safe for all ordinary uses for which they are opened to the public.**

The prevailing view of the courts in America is that for a failure to keep streets in repair there is an implied common-law liability for resulting injury resting upon every chartered municipality. After long contention in the federal courts this doctrine was at last authoritatively adopted by the Supreme Court of the United States in the leading case of *Barnes v. District of Columbia*,<sup>46</sup> and this view is also maintained in the states of Alabama,<sup>47</sup> Colorado,<sup>48</sup> the Dakotas,<sup>49</sup> Delaware,<sup>50</sup> Florida,<sup>51</sup> Georgia,<sup>52</sup> Illinois,<sup>53</sup> Indiana,<sup>54</sup> Iowa,<sup>55</sup> Kansas,<sup>56</sup>

<sup>45</sup> *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472. See *Abendroth v. Town of Greenwich*, 29 Conn. 356.

<sup>46</sup> 91 U. S. 540, 23 L. Ed. 440.

<sup>47</sup> *Campbell's Adm'x v. City Council of Montgomery*, 53 Ala. 527, 25 Am. Rep. 656.

<sup>48</sup> *City of Denver v. Dean*, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594.

<sup>49</sup> *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414.

<sup>50</sup> *Anderson v. City of Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509.

<sup>51</sup> *City of Tallahassee v. Fortune*, 3 Fla. 19, 52 Am. Dec. 358.

<sup>52</sup> *Parker v. Mayor, etc., of City of Macon*, 39 Ga. 725, 99 Am. Dec. 486.

<sup>53</sup> *City of Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860.

<sup>54</sup> *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

<sup>55</sup> *Beazan v. Incorporated Town of Mason City*, 58 Iowa, 233, 12 N. W. 279.

<sup>56</sup> *Kansas City v. Birmingham*, 45 Kan. 212, 25 Pac. 569.

Kentucky,<sup>67</sup> Louisiana,<sup>68</sup> Maryland,<sup>69</sup> Montana,<sup>70</sup> Minnesota,<sup>71</sup> Mississippi,<sup>62</sup> Missouri,<sup>63</sup> Nebraska,<sup>64</sup> Nevada,<sup>65</sup> North Carolina,<sup>66</sup> Ohio,<sup>67</sup> Oregon,<sup>68</sup> Pennsylvania,<sup>69</sup> Tennessee,<sup>70</sup> Texas,<sup>71</sup> Utah,<sup>72</sup> Virginia,<sup>73</sup> Washington,<sup>74</sup> and West Virginia.<sup>75</sup> Under the lead of Massachusetts, where this subject has been often and ably considered,<sup>76</sup> the following states have adopted the contrary view: Arkansas,<sup>77</sup> California,<sup>78</sup> Connecticut,<sup>79</sup> Maine,<sup>80</sup> Michigan,<sup>81</sup> New Hampshire,<sup>82</sup> New Jersey,<sup>83</sup>

<sup>67</sup> Greenwood v. Louisville, 13 Bush (Ky.) 226, 26 Am. Rep. 263.

<sup>68</sup> Cline v. Crescent City R. Co., 41 La. Ann. 1031, 6 South. 851.

<sup>69</sup> Mayor, etc., of City of Baltimore v. Marriott, 9 Md. 160.

<sup>70</sup> Sullivan v. City of Helena, 10 Mont. 134, 25 Pac. 94.

<sup>71</sup> Welter v. City of St. Paul, 40 Minn. 460, 42 N. W. 392, 12 Am. St. Rep. 752.

<sup>72</sup> Whitfield v. City of Meridian, 66 Miss. 570, 6 South. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596.

<sup>73</sup> Haniford v. City of Kansas, 103 Mo. 172, 15 S. W. 753.

<sup>74</sup> City of Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41.

<sup>75</sup> McDonough v. Mayor, etc., of Virginia City, 6 Nev. 90.

<sup>76</sup> Meares v. Commissioners of Town of Wilmington, 31 N. C. 73, 49 Am. Dec. 412.

<sup>77</sup> Village of Shelby v. Clagett, 46 Ohio St. 549, 20 N. E. 407, 5 L. R. A. 606.

<sup>78</sup> Farquar v. City of Roseburg, 18 Or. 271, 22 Pac. 1103, 17 Am. St. Rep. 732.

<sup>79</sup> Borough of Brookville v. Arthurs, 130 Pa. 501, 18 Atl. 1076.

<sup>80</sup> Mayor, etc., of City of Knoxville v. Bell, 12 Lea (Tenn.) 157.

<sup>81</sup> City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

<sup>82</sup> Levy v. Salt Lake City, 3 Utah, 63, 1 Pac. 160.

<sup>83</sup> McCoull v. City of Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691; Shearer v. Town of Buckley, 31 Wash. 370, 72 Pac. 76.

<sup>74</sup> Hutchinson v. City of Olympia, 2 Wash. T. 314, 5 Pac. 606.

<sup>75</sup> Moore v. City of Huntington, 31 W. Va. 842, 8 S. E. 512.

<sup>76</sup> Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63; Hill v. City of Boston, 122 Mass. 344, 23 Am. Dec. 332.

<sup>77</sup> Ft. Smith v. York, 52 Ark. 85, 12 S. W. 157.

<sup>78</sup> Arnold v. City of San Jose, 81 Cal. 618, 22 Pac. 877.

<sup>79</sup> Beardsley v. City of Hartford, 50 Conn. 529, 47 Am. Rep. 677.

<sup>80</sup> Aldrich v. Inhabitants of Gorham, 77 Me. 287.

<sup>81</sup> City of Detroit v. Blackaby, 21 Mich. 84, 4 Am. Rep. 450. But there is in Michigan the duty upon the city to keep its streets in a reasonably safe condition for travel. Finch v. Bangor, 133 Mich. 149, 94 N. W. 738.

<sup>82</sup> Sweeney v. Newport, 65 N. H. 86, 18 Atl. 86.

<sup>83</sup> Wild v. Paterson, 47 N. J. Law, 406, 1 Atl. 490.

Rhode Island,<sup>84</sup> South Carolina,<sup>85</sup> Vermont,<sup>86</sup> and Wisconsin.<sup>87</sup> The Supreme Court of the United States recognizes its duty to follow the decisions of the highest court of each state in regard to municipal liability for tort therein.<sup>88</sup> It is to be noted, however, that in some of the last-named states the liability has been imposed by statute.<sup>89</sup>

But a municipality is not an insurer of public safety on its streets.<sup>90</sup> It does not assume to care for and protect the public using its streets under all conditions and emergencies. Dangers may suddenly appear in the streets, of which the city may have no notice. Exigencies may arise with which it is unable to cope, from which the public may suffer injury, but for which the municipality is not liable. It owes the public only the duty of reasonable diligence to keep its streets in such condition that the public, by exercising like diligence, may use them for all lawful purposes with reasonable security.<sup>91</sup> A failure to perform this duty will render a municipality liable for the damage occasioned thereby.<sup>92</sup>

<sup>84</sup> *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578.

<sup>85</sup> *Young v. City Council of Charleston*, 20 S. C. 116, 47 Am. Rep. 827.

<sup>86</sup> *Welsh v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

<sup>87</sup> *Cairncross v. Village of Pewaukee*, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473.

<sup>88</sup> *City of Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, and cases cited in notes 47-76, inclusive, *supra*.

<sup>89</sup> *Roberts v. City of Detroit*, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; *Byington v. City of Merrill*, 112 Wis. 211, 88 N. W. 26; *Huntington v. City of Calais*, 105 Me. 144, 73 Atl. 829; *Jones v. City of Boston*, 201 Mass. 267, 87 N. E. 589.

<sup>90</sup> *City of Portsmouth v. Lee*, 112 Va. 419, 71 S. E. 630; *Elam v. City of Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512; *Mitchell v. Tell City* (Ind. App.) 81 N. E. 594; *City of Dayton v. Glaser*, 76 Ohio St. 471, 81 N. E. 991, 12 L. R. A. (N. S.) 916.

<sup>91</sup> *JACKSON v. CITY OF GREENVILLE*, 72 Miss. 220, 16 South. 382, 27 L. R. A. 527, 48 Am. St. Rep. 553, *Cooley, Cas. Mun. Corp.* 281.

<sup>92</sup> *City of Denver v. Baldasari*, 15 Colo. App. 157, 61 Pac. 190; *Weightman v. Washington*, 1 Black (U. S.) 39, 17 L. Ed. 52; *City of Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Peake v. City of Superior*, 106 Wis. 403, 82 N. W. 306; *Morris v. Salt Lake City*, 35

For an injury occurring to any person from the apparent neglect of the municipality to keep its streets in repair, two defenses are open, which are generally recognized as sufficient: (1) That the city had no notice, actual or implied, of the existing defect. The duty to repair is one of reasonable diligence. Liability cannot be incurred in such case before duty begins; and duty does not precede notice. But actual notice is not required.<sup>93</sup> Having the care of the streets, the munici-

Utah, 474, 101 Pac. 373; *City of Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079; *Hartnett v. City of New York* (Sup.) 127 N. Y. Supp. 295; *Corry v. City of Columbia*, 88 S. C. 553, 71 S. E. 49; *City of Denver v. Moewes*, 15 Colo. App. 28, 60 Pac. 986; *Same v. Dunsmore*, 7 Colo. 329, 3 Pac. 705; *City of Boulder v. Niles*, 9 Colo. 418, 12 Pac. 632; *City of Denver v. Aaron*, 6 Colo. App. 234, 40 Pac. 587; *Bedford City v. Sitwell*, 110 Va. 296, 65 S. E. 471; *Walters v. Village of Exeter*, 87 Neb. 125, 126 N. W. 868; *Turner v. City of Newburgh*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453.

While a municipality may authorize erections for public utilities, such as hydrants, in its streets, it still owes to the public the duty to keep its streets in a reasonably safe condition for travelers by day and night; but it is not an insurer of the safety of those using its streets. *Burnes v. City of St. Joseph*, 91 Mo. App. 489.

It is the duty of the city to keep its streets in reasonably safe condition for all those who rightfully use them, or have occasion to pass over them for the purpose of business, convenience, or pleasure. *City of Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 61, 50 L. R. A. 783.

In the absence of a positive requirement of law that a city keep its streets in a safe or reasonably safe condition, it is bound only to exercise ordinary care to keep them in a reasonably safe condition. *City of Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95; *Finch v. Bangor*, 133 Mich. 149, 94 N. W. 738; *Aucoin v. City of New Orleans*, 105 La. 271, 29 South. 502. And a city cannot claim that its streets are so far public as to free it from responsibility. *Twist v. City of Rochester*, 165 N. Y. 619, 59 N. E. 1131.

<sup>93</sup> A city is not liable for injuries caused by defective streets in absence of actual notice of such defects, or unless they have existed so long that notice should be imputed to it. *Bell v. Henderson*, 24 Ky. Law Rep. 2434, 74 S. W. 206; *City of Lafayette v. Larson*, 73 Ind. 367; *Jansen v. City of Atchison*, 16 Kan. 358; *Young v. City of Webb City*, 150 Mo. 333, 51 S. W. 709; *Fitzgerald v. City of Concord*, 140 N. C. 110, 52 S. E. 309; *Downs v. Commissioners, 2 Pennewill (Del.) 132*, 45 Atl. 717. See *JONES v. CITY OF CLINTON*, 100 Iowa, 333, 69 N. W. 418, Cooley, Cas. Mun. Corp. 286; *Snyder v. City*

pality must use reasonable diligence to know their condition, such as an ordinary man uses in the care of his own property. Notice may, therefore, be implied from the obvious existence of the defect for a sufficient period. What is commonly known by the people in any portion of the city is imputed to the municipality.<sup>94</sup> It is, of course, generally recognized that the municipality may have a reasonable time after notice in which to make the repairs.<sup>95</sup> (2) The lack of any corporate

of Albion, 113 Mich. 275, 71 N. W. 475; Mayor, etc., of City of Montezuma v. Wilson, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150; Town of Franklin v. House, 104 Tenn. 1, 55 S. W. 153; Ransom v. City of Belvidere, 87 Ill. App. 167; City of Murphysboro v. O'Riley, 36 Ill. App. 157; Same v. Baker, 34 Ill. App. 657. But see Arthur v. City of Charleston, 51 W. Va. 130, 41 S. E. 171. And compare City of Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846.

But a city can only be charged with actual notice of a defect by proof that such notice was given to an officer having authority to act, or whose duty it was to report the matter to some one with authority. City of Dallas v. Meyers (Tex. Civ. App.) 55 S. W. 742.

<sup>94</sup> Milledge v. Kansas City, 100 Mo. App. 490, 74 S. W. 892; Smith v. Sioux City, 119 Iowa, 50, 93 N. W. 81; City of Louisville v. Brewer's Adm'r, 24 Ky. Law Rep. 1671, 72 S. W. 9; Barr v. City of Kansas, 105 Mo. 550, 16 S. W. 483; Shipley v. City of Bolivar, 42 Mo. App. 401; McAllister v. City of Bridgeport, 72 Conn. 733, 46 Atl. 552; McDonald v. City of Ashland, 78 Wis. 251, 47 N. W. 434; TICE v. BAY CITY, 84 Mich. 461, 47 N. W. 1062, Cooley, Cas. Mun. Corp. 285; Bradford v. City of Anniston, 92 Ala. 349, 8 South. 683, 25 Am. St. Rep. 60; Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138; Mayor, etc., of Birmingham v. Starr, 112 Ala. 98, 20 South. 424; Jones v. City of Greensboro, 124 N. C. 310, 32 S. E. 675; Urtel v. City of Flint, 122 Mich. 65, 80 N. W. 991; City of Streator v. Chrisman, 182 Ill. 215, 54 N. E. 997; L'Herault v. City of Minneapolis, 69 Minn. 261, 72 N. W. 73; Breil v. City of Buffalo, 144 N. Y. 163, 38 N. E. 977; City of Palestine v. Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147; Poole v. City of Jackson, 93 Tenn. 62, 23 S. W. 57; Rosevere v. Borough of Osceola Mills, 169 Pa. 555, 32 Atl. 548.

Where there is abundant time by reason of reasonably frequent examination to discover and remedy a defective street, and a person is injured in consequence of such defect, the municipality will not be relieved from liability for the consequences of its negligence. City of Chicago v. McCabe, 93 Ill. App. 288. See Corey v. City of Ann Arbor, 124 Mich. 134, 82 N. W. 804; Buckley v. City of Kansas City, 156 Mo. 16, 56 S. W. 319.

<sup>95</sup> Fuller v. Mayor, etc., of City of Jackson, 82 Mich. 480, 46 N. W.

fund and of any power to obtain one applicable to repairs has also been recognized as a good defense. Such inability in a municipal corporation is rare and exceptional. Want of funds alone is no defense;<sup>96</sup> but lack of power to raise a fund applicable to such purpose was recognized as a just defense to the Men of Devon,<sup>97</sup> and has been ever since sustained in English and American courts. It is the chief ground of nonliability of quasi corporations,<sup>98</sup> and should have equal force and recognition in favor of municipalities not empowered to perform the duty of repair. But there are cases which do not recognize the sufficiency of this defense, and declare it the duty of the corporation to close a dangerous street which it cannot repair.<sup>99</sup> And the courts which recognize inability as a valid defense require the municipality to show that it has exhausted the means at its command to raise funds for the purpose, and given signals of the danger.<sup>1</sup>

#### *Reasonable Care, What is*

What is reasonable care is a question of fact depending upon the circumstances of each particular case. The degree of

721; *Brady v. City of Lowell*, 57 Mass. (3 CUSH.) 121; *Seward v. City of Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451; *Gerber v. Kansas City*, 105 Mo. App. 191, 79 S. W. 717; *City of Lynchburg v. Wallace*, 95 Va. 640, 29 S. E. 675.

Where territory is annexed, a city has a reasonable time to render the streets therein reasonably safe before it can be held liable for injuries from defects. *City of Richmond v. Mason*, 109 Va. 546, 65 S. E. 8, 17 Ann. Cas. 194.

<sup>96</sup> Mayor, etc., of *City of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243; *Prideaux v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Village of Shelby v. Clagett*, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331.

<sup>97</sup> *Russell v. Men of Devon*, 2 Durn. & E. 667. And see *Whitfield v. City of Meridian*, 66 Miss. 570, 6 South. 244, 4 L. R. A. 884, 14 Am. St. Rep. 596.

<sup>98</sup> Post, § 165, note 35.

<sup>99</sup> *Elliott, Roads & Sts.*, pp. 445, 446, 452; *Monk v. Town of New Utrecht*, 104 N. Y. 552, 11 N. E. 268; Mayor, etc., of *City of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243.

<sup>1</sup> Mayor, etc., of *City of Birmingham v. Lewis*, *supra*; *Lord v. City of Mobile* (1897) 113 Ala. 360, 21 South. 366; *Whitfield v. City*

repair of a street is a matter of municipal discretion. The standard of repair may well be different in various localities. What is a defect in a fine avenue or great thoroughfare may not be such in an obscure street or alley.<sup>2</sup> It has even been held that what might constitute actionable negligence on the part of a city as to one person may not be actionable as to another,<sup>3</sup> which is equivalent to saying that what would be contributory negligence defeating the action of one person might not bar the action of another person of weaker sense and power. Here, as in all cases involving what is reasonable, is a broad boundary of uncertainty between the fixed rules of the law. But it has been held that the municipality must use such care as will protect not only the busy traveler and pedestrian, but also the playing child and even the idle loafer.<sup>4</sup>

of Meridian, 66 Miss. 570, 6 South. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596; Carney v. Village of Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; Moon v. City of Ionia, 81 Mich. 635, 46 N. W. 25; City of Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Albrittin v. Mayor, etc., of City of Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Delger v. City of St. Paul (C. C.) 14 Fed. 567. See Collett v. City of New York, 51 App. Div. 394, 64 N. Y. Supp. 693, as to faulty construction and warning.

<sup>2</sup> Landolt v. City of Norwich, 37 Conn. 615; City of Rockford v. Hollenbeck, 34 Ill. App. 40; City of Flora v. Naney, 136 Ill. 45, 26 N. E. 645; Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; City of South Omaha v. Powell, 50 Neb. 798, 70 N. W. 391.

<sup>3</sup> Municipalities are not bound to the same degree of care on an alley as on its streets. Musick v. Borough of Latrobe, 184 Pa. 375, 39 Atl. 226; Gulline v. Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102; Walker v. Town of Reidsville, 96 N. C. 382, 2 S. E. 74.

<sup>4</sup> District of Columbia v. Boswell, 6 App. D. C. 402; City of Covington v. Bollwinkle (Ky.) 121 S. W. 664; City of Denver v. Murray, 18 Colo. App. 142, 70 Pac. 440 (where the city had permitted the erection of a derrick, which fell upon a child who was playing around it); City of Waverly v. Reesor, 93 Ill. App. 649; City of Omaha v. Richards, 49 Neb. 244, 68 N. W. 528 (where the city of Omaha was held liable for the death of a boy who fell through a section of a sidewalk which he was using as a raft on a pond of water which had accumulated over a street and adjacent private property, because of the city's negligence in constructing a storm sewer). See City of Chicago v. Keefe (Loafer) 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep.

## OBSTRUCTIONS

**119. Reasonable care of streets also requires of the municipality the removal from them of unlawful obstructions and the signaling of dangerous ones.**

As we have hitherto seen, the temporary and partial obstruction of a street may be permitted by the city when necessary for building, removing, improving, or commerce; <sup>5</sup> but such work must obviously be performed with dispatch and care, and municipal consent must be obtained for the obstruction. Whenever and wherever it is permitted, it is a municipal duty to give reasonable warning to the public, both day and night, of the presence of danger, to the end that it may be avoided.<sup>6</sup> Hitching posts, electric poles, stepping stones, and hydrants are not regarded as unlawful obstructions when placed at the curbstone or margin of the street, so as not to render the way unsafe;<sup>7</sup> but such things placed either with or without municipal consent within the portion of the street commonly used either for riding, driving, or walking, and not properly guarded or signaled, will give action against the municipality to one injured thereby.<sup>8</sup> Recoveries against

668; *Hunt v. City of Salem*, 121 Mass. 294; *Reed, City of, v. Madison*, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

<sup>5</sup> *Ante*, §§ 109, 110.

<sup>6</sup> *Leonard v. Boston*, 183 Mass. 68, 66 N. E. 596; *Cummings v. City of Hartford*, 70 Conn. 115, 38 Atl. 916; *City of Louisville v. Keher*, 117 Ky. 841, 79 S. W. 270; *Bauer v. City of Rochester*, 59 Hun, 616, 12 N. Y. Supp. 418; *City of Canton v. Dewey*, 71 Ill. App. 346; *Lloyd v. Mayor, etc., of City of New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Oliver v. City of Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

<sup>7</sup> *City of Denver v. Sherret*, 88 Fed. 226, 31 C. C. A. 499; *Weinstein v. City of Terre Haute*, 147 Ind. 556, 46 N. E. 1004; *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Macomber v. City of Taunton*, 100 Mass. 255.

<sup>8</sup> *City of Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 397, 50 L. R. A.

a municipality have also been sustained because of its failure to remove or properly signal as obstructions to the street an ash pile,<sup>9</sup> motor,<sup>10</sup> steam roller,<sup>11</sup> machinery,<sup>12</sup> a furnace,<sup>13</sup> a tent,<sup>14</sup> building material,<sup>15</sup> a hydrant,<sup>16</sup> logs,<sup>17</sup> rocks and

783; *City of Circleville v. Sohn*, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; *THUNBORG v. CITY OF PUEBLO*, 18 Colo. App. 80, 70 Pac. 148, Cooley, Cas. Mun. Corp. 288; *City of El Paso v. Dolan* (Tex. Civ. App.) 25 S. W. 669 (glass); *Hayes v. City of West Bay City*, 91 Mich. 418, 51 N. W. 1067; *Mayor, etc., of City of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243; *Crowther v. City of Yonkers*, 60 Hun, 586, 15 N. Y. Supp. 588; *South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930; *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844; *Powers v. Penn Mut. Life Ins. Co.*, 91 Mo. App. 55; *Arey v. City of Newton*, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604; *Ring v. City of Cohoes*, *supra*; *King v. City of Oshkosh*, 75 Wis. 517, 44 N. W. 745; *City of New York v. Sheffield*, 4 Wall. (U. S.) 189, 18 L. Ed. 416.

<sup>9</sup> *Kane v. City of Troy*, 48 Hun, 619, 1 N. Y. Supp. 536; *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

<sup>10</sup> *Stanley v. City of Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

<sup>11</sup> *Hughes v. City of Fond du Lac*, 73 Wis. 380, 41 N. W. 407. See *Mulligan v. City of New Britain*, 69 Conn. 96, 36 Atl. 1005. Contra, where a steam roller frightened a horse it was held that the city was not liable. *Lane v. City of Lewiston*, 91 Me. 292, 39 Atl. 999.

<sup>12</sup> *Whitney v. Town of Ticonderoga*, 127 N. Y. 40, 27 N. E. 403; *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628.

<sup>13</sup> *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124.

<sup>14</sup> *Ayer v. City of Norwich*, 39 Conn. 376, 12 Am. Rep. 396.

<sup>15</sup> *Joslyn v. City of Detroit*, 74 Mich. 459, 42 N. W. 50; *Munley v. Sugar Notch Borough*, 215 Pa. 228, 64 Atl. 377; *Smith v. Davis*, 22 App. D. C. 298; *Rommeney v. City of New York*, 49 App. Div. 64, 63 N. Y. Supp. 186; *Fairgrieve v. City of Moberly*, 39 Mo. App. 31. See *McDonald v. City of Troy*, 59 Hun, 618, 13 N. Y. Supp. 385.

<sup>16</sup> *Adams v. City of Oshkosh*, 71 Wis. 49, 36 N. W. 614.

Where no part of the street was appropriated to sidewalks, and vehicles were actually driven on any part of it, the municipality was held liable to a driver who was injured by reason of an unguarded hydrant placed 11 feet from the street line. *Burnes v. City of St. Joseph*, 91 Mo. App. 489. See *THUNBORG v. PUEBLO*, 18 Colo. App. 80, 70 Pac. 148, Cooley, Cas. Mun. Corp. 288.

<sup>17</sup> *Johnson v. Inhabitants of Whitefield*, 18 Me. 286, 36 Am. Dec. 721; *Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. 212.

stones,<sup>18</sup> and also dangerous holes and excavations in or near the street,<sup>19</sup> and objects naturally tending to frighten horses ordinarily gentle.<sup>20</sup>

#### *Street Lights*

There is said to be no implied duty resting on a municipality to light its streets;<sup>21</sup> but where such duty is imposed by

<sup>18</sup> *Koch v. City of Williamsport*, 195 Pa. 488, 46 Atl. 67; *May v. City of Anaconda*, 26 Mont. 140, 66 Pac. 759; *Patterson v. City of Austin*, 15 Tex. Civ. App. 201, 39 S. W. 976; *Hesselbach v. St. Louis*, 179 Mo. 505, 78 S. W. 1009.

<sup>19</sup> *Mayor, etc., of City of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243; *Brush v. City of New York*, 59 App. Div. 12, 69 N. Y. Supp. 51; *Foy v. City of Winston*, 126 N. C. 381, 35 S. E. 609; *City of South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930; *Drew v. Town of Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166.

A city must use reasonable care to protect pedestrians from falling into excavations upon private lots and adjacent to the sidewalk. *Wiggin v. City of St. Louis*, 135 Mo. 558, 37 S. W. 528. See *Oklahoma City v. Meyers*, 4 Okl. 686, 46 Pac. 552; *Hawley v. City of Atlantic*, 92 Iowa, 172, 60 N. W. 519; *Talty v. Same*, 92 Iowa, 135, 60 N. W. 516; *Brown v. Town of Louisburg*, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677.

<sup>20</sup> *City of Weatherford v. Lowery* (Tex. Civ. App.) 47 S. W. 34; *City of Vandalia v. Huss*, 41 Ill. App. 517; *Bowes v. City of Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Agnew v. Corunna*, 55 Mich. 428, 21 N. W. 873, 54 Am. Rep. 383.

Where a horse of ordinary gentleness merely shies, so that the driver does not lose control of him, but is injured by coming in contact with an obstruction in the street, the city is liable. *Burnes v. City of St. Joseph*, 91 Mo. App. 489. See *Patterson v. City of Austin*, *supra*; *Taylor v. City of Ballard*, 24 Wash. 191, 64 Pac. 143.

<sup>21</sup> *McHugh v. City of St. Paul*, 67 Minn. 441, 70 N. W. 5; *City of Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Gaskins v. City of Atlanta*, 73 Ga. 746.

A municipality need not light its streets, if their construction is reasonably safe for travel, in the absence of statutory command or charter duty. *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096.

Where the charter of a city gives it power to provide for lighting its streets, but does not require it to exercise such power, there is no general duty devolved upon the city to light the streets that will make its failure to do so actionable negligence. *City of Daytona v. Edson*, 46 Fla. 463, 34 South. 954, 4 Ann. Cas. 1000. See *City of Chicago v. Apel*, 50 Ill. App. 132.

the legislature, or where the city has voluntarily assumed performance of this appropriate municipal function, reasonable care must be exercised to keep the street lamps in good order, and properly lighted; and for failure to do this an action will lie in favor of one receiving special injury therefrom.<sup>22</sup>

### SIDEWALKS

**120. Sidewalks under municipal control are objects of the same reasonable municipal care as other parts of the street, and an action will lie for injuries resulting from nonfeasance or misfeasance of this municipal duty.**

It is immaterial whether the municipality has built the sidewalk. Being a part of the street, it is under municipal control, and the corporation will be liable for neglecting to exercise ordinary care to keep it reasonably safe.<sup>23</sup> The duty is

<sup>22</sup> *Gordon v. City of Richmond*, 83 Va. 436, 2 S. E. 727; *McAllister v. City of Albany*, 18 Or. 426, 23 Pac. 845; *City of Cleveland v. King*, 132 U. S. 295, 10 Sup. Ct. 90, 33 L. Ed. 334; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Bauer v. City of Rochester*, 59 Hun, 616, 12 N. Y. Supp. 418.

A city cannot escape liability for injuries caused by the failure of an electric light company which had contracted to light the streets. *City of Baltimore v. Beck*, 96 Md. 183, 53 Atl. 976.

<sup>23</sup> *City of Beardstown v. Clark*, 104 Ill. App. 568; *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899; *Midway v. Lloyd*, 24 Ky. Law Rep. 2448, 74 S. W. 195; *City of Louisville v. Johnson*, 24 Ky. Law Rep. 685, 69 S. W. 803; *City of Dallas v. Meyers* (Tex. Civ. App.) 55 S. W. 742; *Same v. Jones* (Tex. Civ. App.) 54 S. W. 606; *City Council of Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389; *City of Evansville v. Frazer*, 24 Ind. App. 628, 56 N. E. 729; *Kellow v. City of Scranton*, 195 Pa. 134, 45 Atl. 676; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404; *Barr v. Same*, 105 Mo. 550, 16 S. W. 483; *Fulliam v. City of Muscatine*, 70 Iowa, 436, 30 N. W. 861; *Graham v. City of Albert Lea*, 48 Minn. 201, 50 N. W. 1108.

In the absence of a positive requirement of law that a city keep its streets in a safe or reasonably safe condition, it is bound only to exercise ordinary care to keep them in a reasonably safe condition.

an active one, beginning with the construction of the walk and continuing thenceforth as long as it remains under municipal control.<sup>24</sup> If it be the duty of the abutter to make repairs, the municipality is not relieved from liability by notice given to the abutter. The walk must be made safe within a reasonable time, or the municipality will be liable for damages occurring from its being out of repair.<sup>25</sup>

#### *Reasonable Care—Latent Defects*

The municipality is not an insurer of the safety of its sidewalks.<sup>26</sup> Its duty is fully performed by the exercise of reasonable care, not only in construction but also in the inspection of walks. It is not liable for every latent defect, but it may be liable for latent defects which proper inspection would have disclosed. The just rule seems to be that whenever a municipality maintains a sidewalk which it knows, or with due care would know, to be unsafe, it is liable in damages to one suffering injury from the defect.<sup>27</sup>

*City of Dallas v. Moore* (Tex. Civ. App.) 74 S. W. 95; *Brown v. Incorporated Town of Chillicothe*, 122 Iowa, 640, 98 N. W. 502. But see *Wolf v. District of Columbia*, 21 App. D. C. 464.

<sup>24</sup> *Brake v. Kansas City*, 100 Mo. App. 611, 75 S. W. 191; *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584; *Fulliam v. City of Muscatine*, 70 Iowa, 436, 30 N. W. 861; *Barr v. Kansas City*, *supra*.

<sup>25</sup> *Domer v. District of Columbia*, 21 App. D. C. 284; *Michigan City v. Phillips* (Ind. App.) 69 N. E. 700; *Bennett v. Village of Sing Sing*, 60 Hun, 579, 14 N. Y. Supp. 463; *City of Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887; *City of Flora v. Naney*, 31 Ill. App. 493; *Id.*, 136 Ill. 45, 26 N. E. 645; *Kinney v. City of Tekemah*, 30 Neb. 605, 46 N. W. 885; *Hutchings v. Inhabitants of Sullivan*, 90 Me. 131, 37 Atl. 883; *Betz v. Limingi*, 46 La. Ann. 1113, 15 South. 385, 46 Am. St. Rep. 344.

<sup>26</sup> *Burns v. City of Bradford*, 137 Pa. 361, 20 Atl. 997, 11 L. R. A. 726.

<sup>27</sup> *City of Covington v. Johnson*, 24 Ky. Law Rep. 602, 69 S. W. 703; *Padelford v. Eagle Grove*, 117 Iowa, 616, 91 N. W. 899; *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319; *Cowie v. City of Seattle*, 22 Wash. 659, 62 Pac. 121; *BLYHL v. VILLAGE OF WATERVILLE*, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596, *Cooley, Cas. Mun. Corp.* 290; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A.

*Hatchways and Coal Chutes in Walks*

Hatchways and similar entrances from sidewalks to cellars are necessities in urban life, but the city must take care that such things do not become dangerous to pedestrians.<sup>28</sup> If basement steps are necessary and permitted in a sidewalk, they must be guarded with suitable railing;<sup>29</sup> and the doors or lids of hatchways or coal chutes must be safe and strong, so as to protect pedestrians from danger. For failure to exercise due care in this respect the municipality may be liable in damages.<sup>30</sup> The municipal duty of reasonable care applies also to things above the sidewalk, such as signboards, poles, and awnings.<sup>31</sup>

778; Stebbins v. Keene Tp., 55 Mich. 552, 22 N. W. 37; Kellogg v. Village of Janesville, 34 Minn. 132, 24 N. W. 359.

A city cannot be held liable for an injury caused by a latent defect in a sidewalk without actual notice, where the authorities have used all ordinary and reasonable means to discover it. Powell v. Village of Bowen, 92 Ill. App. 453. See City of Rockford v. Hollenbeck, 34 Ill. App. 40; Moon v. City of Ionia, 81 Mich. 635, 46 N. W. 25; Young v. Kansas City, 45 Mo. App. 600; Jackson v. Pool, 91 Tenn. 448, 19 S. W. 324.

<sup>28</sup> Village of Evanston v. Fitzgerald, 37 Ill. App. 86; Niblett v. Mayor, etc., of City of Nashville, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755; Corcoran v. Peekskill, 108 N. Y. 151, 15 N. E. 309; City of Franklin v. Harter, 127 Ind. 446, 26 N. E. 882; Sweeney v. City of Butte, 15 Mont. 274, 39 Pac. 286; CITY OF WABASHA v. SOUTHWORTH, 54 Minn. 79, 55 N. W. 818, Cooley, Cas. Mun. Corp. 293.

<sup>29</sup> McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 668; Gridley v. City of Bloomington, 68 Ill. 47; Id., 88 Ill. 554, 30 Am. Rep. 566. But see Beardsley v. City of Hartford, 50 Conn. 542, 47 Am. Rep. 677.

<sup>30</sup> Johnston v. City of Charleston, 3 S. C. 232, 16 Am. Rep. 721; Galvin v. Mayor, etc., of City of New York, 112 N. Y. 223, 19 N. E. 675; Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404. But see Littlefield v. City of Norwich, 40 Conn. 408; Elliott, Roads & Sts. p. 453.

<sup>31</sup> Cason v. City of Ottumwa, 102 Iowa, 99, 71 N. W. 192; Bohem v. City of Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; Langan v. City of Atchison, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; Domer v. District of Columbia, 21 App. D. C. 284.

A municipality is bound to exercise careful supervision of electric wires over its streets, and is liable for injury resulting from neglect of such duty, notwithstanding the liability of the owner. Mooney v. Luzerne Borough, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811;

*Ice and Snow*

The presence of ice and snow upon streets and sidewalks has been a fruitful source of litigation in many states, and many diverse rulings have been made, due in large measure to difference of latitude. Generally, it may be said that in this particular, as in others, the municipal duty requires only reasonable care.<sup>32</sup> But what is reasonable in Tallahassee may not be in Kalamazoo. Precautions might be necessary in Oshkosh that would not be necessary in Seattle. Statutes have been passed in the New England states prescribing the measure of municipal duty; but such statutes, of course, are of local application only, and are not enacted in the Southern states. The only rule of general application, therefore, must be that of reasonable care in view of climatic and other conditions.<sup>33</sup>

**Domer v. District of Columbia**, 21 App. D. C. 284. **Contra**, **City of Fremont v. Dunlap**, 69 Ohio St. 286, 69 N. E. 561.

<sup>32</sup> **Gaylord v. City of New Britain**, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752; **Gillrie v. City of Lockport**, 122 N. Y. 403, 25 N. E. 357; **Adams v. Chicopee**, 147 Mass. 440, 18 N. E. 231; **Bell v. City of York**, 31 Neb. 842, 48 N. W. 878; **Grossenbach v. City of Milwaukee**, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614; **Broburg v. City of Des Moines**, 63 Iowa, 523, 19 N. W. 340, 50 Am. Rep. 756.

<sup>33</sup> **Paulson v. Town of Pelican**, 79 Wis. 445, 48 N. W. 715; **Borough of Mauch Chunk v. Kline**, 100 Pa. 119, 45 Am. Rep. 364; **Olson v. Worcester**, 142 Mass. 536, 8 N. E. 441; **Cloughessey v. City of Waterbury**, 51 Conn. 405, 50 Am. Rep. 38.

A city is liable for injuries resulting from ice on a sidewalk caused by the packing of snow which had been allowed to remain on the walk several weeks. **Beck v. City of Buffalo**, 50 App. Div. 621, 63 N. Y. Supp. 499; **Russell v. City of Toledo**, 19 Ohio Cir. Ct. R. 418, 10 O. C. D. 367. See, also, **Corey v. City of Ann Arbor**, 124 Mich. 134, 82 N. W. 804; **Ransom v. City of Belvidere**, 87 Ill. App. 167.

## BRIDGES AND VIADUCTS

121. Viaducts and bridges within a municipality are parts of streets, and objects of the same degree of municipal care.

Unless required by mandatory statute, the construction of a bridge by a municipality is within its discretion; and, the location of a bridge being a governmental function, the municipality is not liable at common law for injury resulting therefrom, save to the extent of appropriating private property to public use under the sovereign power of eminent domain.<sup>34</sup> Under constitutional and statutory rules, however, as we have heretofore seen,<sup>35</sup> it may be liable as well for property damaged as property taken; and liability has been adjudged in one case upon the ground that the state has no right to undertake improvements in a negligent manner.<sup>36</sup> A municipal corporation is not liable for injuries resulting from the negligence or erroneous judgment of its officers or agents in the performance of, or omission to perform, duties which are purely discretionary;<sup>37</sup> such as opening or closing the street,<sup>38</sup> changing a grade,<sup>39</sup> locating a crossing,<sup>40</sup> or even suspending a general regulation for the temporary convenience or pleasure of a portion of its people.<sup>41</sup>

<sup>34</sup> Jones v. Keith, 37 Tex. 399, 14 Am. Rep. 382; Orth v. City of Milwaukee, 59 Wis. 336, 18 N. W. 10.

<sup>35</sup> Ante, § 90.

<sup>36</sup> Hartford County Com'r's v. Wise, 71 Md. 43, 18 Atl. 31.

<sup>37</sup> Howson v. Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654.

<sup>38</sup> Bauman v. Detroit, 58 Mich. 444, 25 N. W. 391.

<sup>39</sup> Northern Transp. Co. of Ohio v. Chicago, 99 U. S. 635, 25 L. Ed. 336.

<sup>40</sup> Smith v. Gould, 61 Wis. 31, 20 N. W. 369.

<sup>41</sup> Burford v. City of Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105; Hill v. Board of Aldermen of City of Charlotte, 72 N. C. 55, 21 Am. Rep. 451; Rivers v. City Council of Augusta, 65 Ga. 376, 38 Am. Rep. 787.

*Ministerial Functions*

But after the discretionary function of location has been performed and the municipality enters upon the business of construction, it enters the field of ministerial functions, and may become liable for failure to exercise reasonable care in the process of construction. It has accordingly been held that a corporation may be liable for failure to place proper guards and railings around the bridge approaches during the construction,<sup>42</sup> and also on the approaches and bridge itself after it is completed,<sup>43</sup> so as to protect persons upon the bridge exercising ordinary care. It must use due care to erect and maintain a reasonably safe structure,<sup>44</sup> and generally is liable for failure to perform, or for negligent performance of its duty in regard to bridges, under the same rules as are applicable to streets.<sup>45</sup> This includes the duty of reasonable inspection and notice of danger, and for failure to exercise these duties municipalities have been held liable for defect in the floor,<sup>46</sup> in the railings of a bridge,<sup>47</sup> and for failure to close or warn the public of a dangerous bridge.<sup>48</sup>

<sup>42</sup> Weirs v. Jones County, 80 Iowa, 351, 45 N. W. 883; Mullen v. Town of Rutland, 55 Vt. 77; Doherty v. Inhabitants of Braintree, 148 Mass. 495, 20 N. E. 106.

<sup>43</sup> Corbalis v. Newberry Tp., 132 Pa. 9, 19 Atl. 44, 19 Am. St. Rep. 588; Langlois v. City of Cohoes, 58 Hun, 226, 11 N. Y. Supp. 908; City of Rosedale v. Golding, 55 Kan. 167, 40 Pac. 284.

<sup>44</sup> Perkins v. Inhabitants of Oxford, 66 Me. 545; Jordan v. City of Hannibal, 87 Mo. 673.

Where a city, under no obligation to do so, attempts to build approaches to a canal bridge built over the canal by the canal trustees, it is liable for damages caused by their defective condition. City of Joliet v. Verley, 35 Ill. 58, 85 Am. Dec. 342.

<sup>45</sup> Village of Marseilles v. Howland, 124 Ill. 547, 16 N. E. 883; 2 Dill. Mun. Corp. § 728.

<sup>46</sup> Langlois v. City of Cohoes, 58 Hun, 226, 11 N. Y. Supp. 908; Strong v. City of Stevens Point, 62 Wis. 255, 22 N. W. 425; Mayor, etc., of City of Griffin v. Johnson, 84 Ga. 279, 10 S. E. 719; Lee County v. Yarbrough, 85 Ala. 590, 5 South. 341; Lyman v. Hampshire, 140 Mass. 311, 3 N. E. 211.

<sup>47</sup> City of Jacksonville v. Drew, 19 Fla. 106, 45 Am. Rep. 5; Woodman v. Town of Nottingham, 49 N. H. 387, 6 Am. Rep. 526.

<sup>48</sup> Carney v. Village of Marseilles, 136 Ill. 401, 26 N. E. 491, 29

## DRAINS AND SEWERS

122. A municipality may also be liable for misfeasance or nonfeasance in the performance of its duty to exercise reasonable care in the construction and maintenance of its drains and sewers.

It is well settled that in deciding to build sewers and in choosing a plan the municipality is exercising governmental discretion, and therefore incurs no liability for the negligence or mistakes of its agents;<sup>49</sup> but it is equally well settled by a great preponderance of authority that a municipality is liable for damages resulting from its neglect to properly discharge its ministerial duty to exercise reasonable care in the

Am. St. Rep. 328; *Albrittin v. Mayor, etc., of City of Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Humphreys v. Armstrong County*, 3 Brewst. (Pa.) 49; *City of Erie v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87. See, also, *Cunliff v. Mayor, etc., of City of Albany*, 2 Barb. (N. Y.) 190. But see *City of Albany v. Cunliff*, 2 N. Y. 165.

<sup>49</sup> *Betham v. City of Philadelphia*, 196 Pa. 302, 46 Atl. 448; *Pressman v. Borough of Dickson City*, 13 Pa. Super. Ct. 236; *Burger v. City of Philadelphia*, 196 Pa. 41, 46 Atl. 262; *Bealafeld v. Borough of Verona*, 188 Pa. 627, 41 Atl. 651; *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88; *Champion v. Crandon*, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856; *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Perry v. City of Worcester*, 6 Gray (Mass.) 544, 66 Am. Dec. 431; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75; *Child v. City of Boston*, 4 Allen (Mass.) 41, 81 Am. Dec. 680.

Where the municipal authorities have adopted a plan of sewerage, they are not liable for damages resulting from an insufficiency in size of the sewers, though they may be for injuries resulting from negligence in their construction. *Cooper v. Scranton City*, 21 Pa. Super. Ct. 17. Mere omission of the municipality to provide adequate means for carrying off the water which accumulates will not sustain an action. *Id.* See *Stevens v. City of Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

But a city is not an insurer of the condition of its sewers, though it is bound to use reasonable care in keeping them in repair. *Weidman v. New York*, 84 App. Div. 321, 82 N. Y. Supp. 771.

construction and maintenance of its sewers.<sup>50</sup> Even the New England states, and others, denying municipal liability for defective streets, generally recognize and enforce this rule with regard to sewers.<sup>51</sup> The courts do not concur as to the ground of this distinction between sewers and streets; nor is there here space to set them forth. They are more interesting than important, and the curious are referred to the able opinion of Judge Holmes in a leading Massachusetts case.<sup>52</sup> The true ground of responsibility for negligence in the care of sewers seems to be the same as in the care of highways, namely, the corporation has neglected its municipal duty to exercise reasonable diligence in the care and management of property under its control.<sup>53</sup> Municipal ownership is not essential to liability; municipal control will be sufficient.<sup>54</sup> On the contrary, municipal ownership of the land over which the drain or sewer runs is not sufficient to cause liability;<sup>55</sup> municipal control is essential. And it has been held that when a sewer runs partly through private and partly through municipal property the corporation is liable for the entire damage done

<sup>50</sup> Chalkley v. City of Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730. And the question of liability of the city is not affected by the fact that the sewer was originally built by the state. *Id.* See *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Clay v. City of St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883; *City of Baltimore v. Schnitker*, 84 Md. 34, 34 Atl. 1132; *Flori v. City of St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Stock v. City of Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Kranz v. City of Baltimore*, 64 Md. 491, 2 Atl. 908; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *City Council of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Semple v. Mayor, etc., of City of Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181.

<sup>51</sup> *Gilman v. Town of Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Bates v. Inhabitants of Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; *Judge v. City of Meriden*, 38 Conn. 90.

<sup>52</sup> *Bates v. Inhabitants of Westborough*, *supra*.

<sup>53</sup> *Tindley v. City of Salem*, 137 Mass. 171, 50 Am. Rep. 289.

<sup>54</sup> *Taylor v. City of Austin*, 32 Minn. 247, 20 N. W. 157.

<sup>55</sup> *Kosmak v. Mayor, etc., of City of New York*, 117 N. Y. 361, 22 N. E. 945.

by overflow at its outlet.<sup>56</sup> In one of the two states<sup>57</sup> least inclined to the doctrine of municipal liability for neglect to repair sewers, the Supreme Court, after elaborate consideration, expressed this conclusion: "The defendant is not responsible for the consequences of a break in the sewer in question per se, even though it be the result of the carelessness of its own agents, for the public is not responsible for such misfeasances of its officers; but when such break has occurred, occasioning a private nuisance exclusively, and the public authorities have been notified of the accident, we think that then they owe a duty to the individual to put the sewer in a proper condition, and that for the nonperformance of such duty an action will lie."<sup>58</sup> It has been held that a municipality is liable for damages sustained by individual owners from the flooding of their premises by drains or sewers;<sup>59</sup> and from the depositing of sewage upon their lands, though this be a necessary result of the plan adopted.<sup>60</sup> So, also, damages may be recovered by

<sup>56</sup> Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

A municipal corporation having power to construct sewers in its streets is liable for improperly locating and constructing the outlet of a sewer, which is principally located along the streets, so as to discharge the sewage on plaintiff's premises, though the lower part of the sewer, including the outlet, is located on private grounds. *Id.* See *Beach v. City of Elmira*, 58 Hun, 606, 11 N. Y. Supp. 913.

<sup>57</sup> California and New Jersey.

<sup>58</sup> *Jersey City v. Kiernan*, 50 N. J. Law, 246, 13 Atl. 170. Cf. *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158.

<sup>59</sup> *McCartney v. City of Philadelphia*, 22 Pa. Super. Ct. 257; *Semple v. Mayor, etc., of City of Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Imler v. City of Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Ashley v. City of Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703.

A city is not liable because surface water flows from a street upon an adjoining lot. *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Sievers v. City and County of San Francisco*, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153. Cf. *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Smith v. Mayor, etc., of City of New York*, 66 N. Y. 295, 23 Am. Rep. 53.

<sup>60</sup> *Bennett v. Marion*, 119 Iowa, 473, 93 N. W. 558; *McBride v. City*

private action for the pollution of a stream by sewage so as to render the water unfit for use by the riparian owner or occupier;<sup>61</sup> and in some cases the municipality has been enjoined from emptying its sewage into a running stream, whereby a public nuisance was created.<sup>62</sup>

### RESPONDEAT SUPERIOR

**123. The liability of municipal corporations in most cases of tort rests upon the general doctrine of the common law that the master is liable for the wrongs done by the servant when acting within the scope of his employment.**

The difficulties encountered in the application of this doctrine to private corporations, as shown in the multitude of

of Akron, 12 Ohio Cir. Ct. R. 610, 6 O. C. D. 739; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858; Bacon v. City of Boston, 154 Mass. 100, 28 N. E. 9; Magee v. City of Brooklyn, 18 App. Div. 22, 45 N. Y. Supp. 473; Boston Belting Co. v. City of Boston, 149 Mass. 44, 20 N. E. 320; City of Ft. Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Attwood v. City of Bangor, 83 Me. 582, 22 Atl. 466; City of Nashville v. Comar, 88 Tenn. 415, 12 S. W. 1027; Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

<sup>61</sup> Pettigrew v. Village of Evansville, 25 Wis. 223, 3 Am. Rep. 50; Gould v. City of Rochester, 105 N. Y. 46, 12 N. E. 275; Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520.

The pollution of a flowing stream by emptying into it the sewage of a city, contaminating and poisoning its waters, and rendering it unfit for use by persons through whose premises it flows, is a public nuisance. Mayor, etc., of Birmingham v. Land, 137 Ala. 538, 34 South. 613; City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; Owens v. City of Lancaster, *supra*.

It has been held that a city has the right to construct drains to conduct the surface water from its streets into a ditch or drain which is a natural water course, so long as reasonable care and skill are exercised in doing the work. Miller & Meyers v. Newport News, 101 Va. 432, 44 S. E. 712.

<sup>62</sup> Haskell v. City of New Bedford, 108 Mass. 208; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. 557; People ex rel. Lind v. City of San Luis Obispo, 116 Cal. 617, 48 Pac. 723.

adjudged cases upon the subject, are enhanced in its attempted application to municipalities. What officers are agents, and what acts of theirs may render the municipality liable for tort, are questions of inherent difficulty, because of the dual nature of the corporation. Obviously, there can be no liability for tort unless there has been a violation of some municipal duty; nor can a corporation be held liable for the acts of officers whom it does not control. But the corporation may be liable for the conduct of officers not appointed by it, but by the state for it.<sup>63</sup> In a leading case in New York the following test of liability has been declared: "To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality."<sup>64</sup> An able author on the subject has thus stated the rule governing liability in such cases: "For the acts of an independent officer, whose duties are fixed and prescribed by law, the city cannot be held chargeable upon the principle of respondeat superior, for the relation of master and servant does not exist. Such officers are quasi civil officers of the government, even though appointed by the corporation. But an exception to this rule exists when the corporation is under an absolute duty to perform the acts which are devolved upon such officers, or when the corporation, as such, derives an immediate profit and advantage therefrom."<sup>65</sup> The application of these fundamental rules to the facts of any case will usually determine the question of municipal liability for the misfeasance or nonfeasance of its officers.

<sup>63</sup> Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472.

<sup>64</sup> Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

<sup>65</sup> Wood, Mast. & Serv. § 463. See Sievers v. City and County of San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

*Independent Contractors*

The general rule that a corporation is not liable for injuries resulting from the acts of an independent contractor is applicable to municipal as well as private corporations; but this rule does not excuse a municipality from liability for damages caused by its failure to perform an absolute duty owing to the public.<sup>66</sup> It has been held, therefore, that a municipal corporation will be liable for the negligence of independent contractors in the building of sewers and cisterns,<sup>67</sup> or in grading or repairing streets;<sup>68</sup> since in these matters it owes the absolute duty of reasonable care. The defense of negligence of a fellow servant in the same department of public works has been sustained in some states;<sup>69</sup> but this defense is not allowed where both the negligent and the injured employé are not engaged in the same department of service.<sup>70</sup>

<sup>66</sup> City of Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833, 37 Am. St. Rep. 432; City of Louisville v. Shanahan (Ky.) 56 S. W. 808; 2 Dill. Mun. Corp. §§ 1028, 1029.

<sup>67</sup> Mayor, etc., of City of Nashville v. Brown, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289.

<sup>68</sup> City of Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

The duty of caring for and supervising the condition of its public streets is one which rests upon a municipality as such, and the doctrine of respondeat superior applies. Hall v. City of Austin, 73 Minn. 134, 75 N. W. 1121.

<sup>69</sup> McDermott v. City of Boston, 133 Mass. 349; Dube v. City of Lewiston, 83 Me. 211, 22 Atl. 112.

<sup>70</sup> Palmer v. City of Portsmouth, 43 N. H. 265; Wanamaker v. City of Rochester, 63 Hun, 625, 17 N. Y. Supp. 321.

**ULTRA VIRES**

**124. A municipal corporation is not civilly liable for damages suffered by individuals in person or property which are caused by the tortious acts of municipal agents or officers assuming to represent it in matters wholly ultra vires.**

A municipal corporation cannot confer upon its agents or officers lawful authority to represent it beyond the scope of its charter powers. For acts not governmental, but strictly corporate or municipal within the scope of the municipal powers exercised for a municipal purpose, the municipality may be liable for misfeasance; as in the negligent construction by officers of a sewer not authorized or directed by the municipal council;<sup>71</sup> or in the forcible and irregular taking of private property without pursuing the legal and authorized procedure for exercising eminent domain and compensating the owner.<sup>72</sup> Or it may be liable for nonfeasance in failing to perform a municipal duty whereby individuals are injured either in person or property.<sup>73</sup> But for the malfeasance of agents or officers of the corporation in assuming to do acts which are entirely beyond the municipal powers and purposes, and cannot, therefore, be lawfully authorized by the municipality, the corporation cannot be held liable in damages to persons suffering injuries therefrom. This logical doctrine, based upon elementary principles of the common law, received general, if not universal, recognition in America by the concurrent decisions

<sup>71</sup> Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

<sup>72</sup> Hunt v. City of Boonville, 65 Mo. 620, 27 Am. Rep. 299.

<sup>73</sup> City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; City of Ft. Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; Moore v. City of Los Angeles, 72 Cal. 287, 13 Pac. 855; Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172.

of the courts for almost a century.<sup>74</sup> It was applied in all civil actions for torts caused by the malfeasance of corporate officers or agents when pursuing any undertaking not within the scope of municipal purposes or powers, express, inherent, or implied; and it still remains the general doctrine of the courts, though not so firmly established and universally recognized as formerly.

*Salt Lake City Case*

The stability of this doctrine of the law is supposed to be shaken by the decision of the Supreme Court of the United States in the unique case of *Salt Lake City v. Hollister*,<sup>75</sup> wherein Mr. Justice Miller, in delivering the opinion of the court, said: "The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers, who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."<sup>76</sup> Concerning this a recent author says: "The effect of this decision is to broaden materially the view of liability of municipal corporations for torts, and it is a strong authority in support of the contention that these bodies should be liable for negligence in respect to their ultra vires acts. \* \* \* Such an act of the corporation is made doubly wrongful by the fact that it is in excess of the corporate power, and for the dam-

<sup>74</sup> *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199, 82 N. W. 626.

The acts of city authorities in cutting a ditch along the side of a lot outside the city limits are ultra vires, and hence the city is not liable for injuries resulting therefrom to the lot owner. *Loyd v. City of Columbus*, 90 Ga. 20, 15 S. E. 818.

<sup>75</sup> 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176.

<sup>76</sup> 118 U. S. 261, 6 Sup. Ct. 1058, 30 L. Ed. 176.

ages resulting from it the corporation should respond." <sup>77</sup> On the contrary, Judge Dillon, in a brief criticism of the comprehensive language of this opinion, says: "The judgment of the court, which, on the special facts, was unquestionably sound, need not necessarily rest upon so broad a basis as the one above indicated, and the observation of the court in the opinion must be limited accordingly. \* \* \* Such a view, if sound as respects private corporations, would seem not to be so as respects municipal corporations, whose powers are defined and limited for the express purpose of protecting the inhabitants from just such liability." <sup>78</sup>

#### *Doctrine Not Unsettled*

An examination of this case shows the foregoing language of Mr. Justice Miller to be an obiter dictum, and supports the criticism of Judge Dillon. Salt Lake City, having erected a distillery, proceeded without authority to engage in the business of distilling spirits, and while so doing, in violation of the United States revenue laws, made fraudulent returns of the quantity of spirits produced. Its fraud was detected, and a lawful assessment made upon the city as a distiller for the gallon tax upon the liquor actually produced and fraudulently omitted from the required report. To enforce the collection of this tax and penalty, the government was about to seize municipal property, whereupon the city, to save its property, paid the tax under protest, and then brought action against the collector to recover the amount so paid. The ground of its action was that the business of distilling spirits by Salt Lake City was ultra vires. The very impudence of the contention provoked the court to pungent ridicule of the plaintiff's action,<sup>79</sup> and naturally strong language was used in refuting

<sup>77</sup> Jones, Negl. Mun. Corp. § 177.

<sup>78</sup> 2 Dill. Mun. Corp. p. 1192, note.

<sup>79</sup> "It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation;

its absurd contention and denying its demand. But the question in the case was not whether a municipality is liable in a civil action to an individual injured by the tortious acts of its agents or officers *ultra vires*, but only whether it could recover from the government a sum of money paid under protest to avoid seizure of its property for a lawful tax and penalty. And accordingly the digest syllabus thus accurately expresses the decision in the case: "A municipal corporation engaged in the business of distilling spirits is subject to internal revenue taxes under the laws of the United States, whether its acts in this respect are or are not *ultra vires*."<sup>80</sup> The gist of the decision is found in the following excerpt from the opinion: "A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally; and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction, by whomsoever conducted."<sup>81</sup>

The fundamental rules of law upon which a person or corporation becomes liable for a tax are so widely different from those which declare liability for a tort that even these cogent words of Justice Miller, used *arguendo* in the decision of a revenue case, are not likely to unsettle the logical rule as to torts to private individuals established by the concurrent decisions of courts of last resort through scores of years in the United States.

for they would thus escape taxation, and ruin all competition." 118 U. S. 259, 6 Sup. Ct. 1057, 30 L. Ed. 176.

<sup>80</sup> 3 Russ & W. Syl. Dig. p. 3517.

<sup>81</sup> 118 U. S. 262, 6 Sup. Ct. 1059, 30 L. Ed. 176.

## CHAPTER XIII

### DEBTS, FUNDS, EXPENSES, AND ADMINISTRATION

- 125. Indebtedness.
- 126. Limitation of Indebtedness.
- 127. Borrowing Money.
- 128-129. Municipal Bonds—Power to Issue.
- 130. Municipal Warrants.
- 131. Funds.
- 132. Rights of Creditors.
- 133. Expenses.
- 134. Budget.
- 135. Claims.
- 136. Appropriation.

### INDEBTEDNESS

- 125. Within the scope of its charter powers, a municipality, in the exercise of corporate functions and transaction of municipal affairs, may incur indebtedness to any extent not forbidden by law.

A municipal corporation, as an agency of the state for more efficient local government, must inevitably incur expenses in the necessary performance of its various municipal functions. These expenses, unless paid for as fast as incurred, stand as obligations of the municipality, to be met and discharged like those of other corporations and individuals under the law. For this purpose the power of taxation is conferred upon the municipality, and thus annually it is supposed to receive sufficient revenue to discharge its indebtedness. But so rapid has been the growth of American cities and towns that it has been found impossible in practice to provide annual revenues equal to the annual expenditures; must less to provide them in advance. From this it results that American municipalities, as a rule, live in the condition of constant indebtedness, exceptions to which are of very rare occurrence.

*Amount*

Clothed with the power of eminent domain, and the inherent power to contract, and required to exercise police powers, and some of these at its peril, a municipality must necessarily incur large expense, the amount of which, under the American rules of local self-government, properly rest in the discretion of the municipality; and, in the absence of constitutional or statutory limitations, this discretion as to amount is unbounded.<sup>1</sup> The law is, however, imperative that, to constitute a valid indebtedness, the expenditure must be incurred within charter powers and for municipal purposes.<sup>2</sup> Within these boundaries the municipality may go on incurring indebtedness at its pleasure to the statutory limit.

### LIMITATION OF INDEBTEDNESS

**126. Limitation to municipal indebtedness may be fixed either by statute or constitution, beyond which no obligation can be incurred by the municipality.**

Limitations upon municipal indebtedness, either by constitution or statute, are to be found in nearly all the American states. The limit is usually fixed at a certain per cent. or aliquot part of the total assessed value of real estate, or real and personal property, in the corporate limits.<sup>3</sup> The form of

<sup>1</sup> Coggeshall v. City of Des Moines, 78 Iowa, 235, 41 N. W. 617; City of Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557.

<sup>2</sup> Brenham v. German-American Bank, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; Id., 144 U. S. 549, 12 Sup. Ct. 975, 36 L. Ed. 399; Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; Bissell v. City of Kankakee, 64 Ill. 249, 21 Am. Rep. 554; Hasbrouck v. City of Milwaukee, 13 Wis. 37, 80 Am. Dec. 718; Hequembourg v. City of Dunkirk, 49 Hun, 550, 2 N. Y. Supp. 447.

<sup>3</sup> Nalle v. City of Austin (Tex. Civ. App.) 42 S. W. 780; Duncan v. City of Charleston, 60 S. C. 532, 39 S. E. 265; Keller v. City of Scranton, 200 Pa. 130, 49 Atl. 781, 86 Am. St. Rep. 709; Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681; Rice v. City of Milwaukee, 100 Wis. 516, 76 N. W. 341; Allen v. City of Davenport, 107

such constitutional inhibition is usually such as to prevent either the Legislature or the municipality from passing the constitutional limit; in which case all indebtedness, howsoever incurred, beyond this limitation is void.<sup>4</sup> Limitation may also be fixed in the charter, or by general statute, which cannot be transgressed by the municipality;<sup>5</sup> but such boundary

Iowa, 90, 77 N. W. 532; *Reynolds v. City of Waterville*, 92 Me. 292, 42 Atl. 553; *Weber v. Dillon*, 7 Okl. 568, 54 Pac. 894; *Phillips v. Reed*, 107 Iowa, 331, 76 N. W. 850; *Freeman v. City of Huron*, 10 S. D. 368, 73 N. W. 260; *Darling v. Taylor*, 7 N. D. 538, 75 N. W. 766; *School Town of Winamac v. Hess*, 151 Ind. 229, 50 N. E. 81; *Graham v. City of Spokane*, 19 Wash. 447, 53 Pac. 714; *Faulkner v. City of Seattle*, 19 Wash. 320, 53 Pac. 365; *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803; *Roff v. Calhoun*, 117 Ga. 263, 43 S. E. 803; *Swanson v. Ottumwa*, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620; *Beck v. St. Paul*, 87 Minn. 381, 92 N. W. 328; *Kronsbein v. Rochester*, 76 App. Div. 494, 78 N. Y. Supp. 813; *City of Austin v. Valle* (Tex. Civ. App.) 71 S. W. 414; *People ex rel. O'Meara v. City Council of Salt Lake City*, 23 Utah, 13, 64 Pac. 460. See, also, *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934.

The Constitution of Pennsylvania, art. 9, § 8, illustrates such an inhibition in few words: "The debt of any \* \* \* city, \* \* \* except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein."

Where the actual and assessed value of taxable property is not the same, the computation is to be made upon the assessed value. *City Water Supply Co. v. City of Ottumwa* (C. C.) 120 Fed. 309.

<sup>4</sup> *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Grady v. Landram*, 63 S. W. 284, 23 Ky. Law Rep. 506; *Duncan v. Charleston*, *supra*; *City of Helena v. Mills*, 94 Fed. 916, 36 C. C. A. 1; *City Water Supply Co. v. City of Ottumwa*, *supra*; *German Ins. Co. v. Manning* (C. C.) 95 Fed. 597. See State ex rel. *Riter v. Quayle*, 26 Utah, 26, 71 Pac. 1060; *Mayor, etc., of Baltimore v. Gill*, 31 Md. 375; *People v. May*, 9 Colo. 80, 10 Pac. 641; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; *City of Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; *John Hancock Mut. Life Ins. Co. v. City of Huron*, 100 Fed. 1001, 40 C. C. A. 683; *Prickett v. City of Marceline* (C. C.) 65 Fed. 469.

<sup>5</sup> *Jutte & Foley Co. v. City of Altoona*, 94 Fed. 61, 36 C. C. A. 84; *McDonald v. Mayor, etc., of City of New York*, 68 N. Y. 23, 23 Am.

being fixed by the Legislature may likewise be transgressed by it, and indebtedness beyond the statutory limit may be imposed upon the municipality by the Legislature.<sup>6</sup>

#### *Kinds of Indebtedness*

The recognized classes of municipal indebtedness are two, (1) bonded and (2) current; and much contention has arisen, in consequence of the joint efforts of reckless municipalities and speculative investors to transgress the prescribed limits, as to whether the prohibition included all classes of municipal indebtedness. In some cases there is manifested a disposition in the courts to give liberal construction to such limitations;<sup>7</sup> but by far the greater weight of authority favors such strict construction of these statutory and constitutional prohibitions as will include all classes of debts, and thereby protect the citizens from overburdensome taxation.<sup>8</sup>

#### *Sum Total—How Computed*

By the weight of judicial opinion the total amount of municipal indebtedness is to be ascertained by adding together

Rep. 144; Keeney v. Mayor, etc., of Jersey City, 47 N. J. Law, 449, 1 Atl. 511; Nelson v. Mayor, etc., of City of New York, 63 N. Y. 535; Mayor, etc., of City of Rome v. McWilliams, 67 Ga. 106.

<sup>6</sup> Mosher v. Independent School Dist. of Ackley, 44 Iowa, 122.

<sup>7</sup> Wells v. Sioux Falls, 16 S. D. 547, 94 N. W. 425; Barnard & Co. v. Knox County (C. C.) 37 Fed. 563, 2 L. R. A. 426; Kelly v. City of Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; State ex rel. Marinette, T. & W. R. Co. v. Common Council of City of Tomahawk, 96 Wis. 73, 71 N. W. 86; Todd v. City of Laurens, 48 S. C. 395, 26 S. E. 682.

<sup>8</sup> Schultze v. Township of Manchester, 61 N. J. Law, 513, 40 Atl. 589; City of Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982; CITY OF LAPORTE v. GAMEWELL FIRE ALARM TELEGRAPH CO., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359, Coolley, Cas. Mun. Corp. 299; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Niles Water-Works v. City of Niles, 59 Mich. 311, 26 N. W. 525; Buck v. City of Eureka, 124 Cal. 61, 56 Pac. 612; Lake County v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; People v. May, 9 Colo. 414, 15 Pac. 36; Doon Dist. Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. Ed. 1044; Francis v. Howard County (C. C.) 50 Fed. 44.

all bonded and current indebtedness,<sup>9</sup> including both imposed and voluntary, and not only present but future obligations, if they be vested or fixed,<sup>10</sup> and also the annual sum payable upon any continuing contract of rental or service.<sup>11</sup> The sum total thus ascertained will be the limit to the municipal power to incur indebtedness. But bonds issued to fund or refund a valid existing indebtedness neither create nor increase the debt, but merely change its form, and are not, therefore, open to objection on the ground that the limitation has been exceeded.<sup>12</sup>

<sup>9</sup> *Sackett v. City of New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Lake County v. Rollins*, 136 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970.

<sup>10</sup> *CITY OF LAPORTE v. GAMEWELL FIRE ALARM TELEGRAPH CO.*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359; *Cooley*, Cas. Mun. Corp. 299; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 222; *Niles Water Works v. City of Niles*, *supra*. The limitation applies to indebtedness imposed by the Legislature as well as that voluntarily incurred by the corporate authorities. *Martin v. Territory*, 5 Okl. 188, 48 Pac. 106.

<sup>11</sup> *Baltimore & O. S. W. R. Co. v. People ex rel.*, 200 Ill. 541, 66 N. E. 148; *Stedman v. City of Berlin*, 97 Wis. 505, 73 N. W. 57; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *Lott v. Mayor*, etc., of City of Waycross, 84 Ga. 681, 11 S. E. 558; *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854; *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782. But see *City of Centerville v. Fidelity Trust & Guaranty Co.*, 118 Fed. 332, 55 C. C. A. 348; *Cain v. City of Wyoming*, 104 Ill. App. 538; *Niles Water Works v. City of Niles*, *supra*; *State v. Medbery*, 7 Ohio St. 523.

<sup>12</sup> *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189; *Hirt v. City of Erie*, 200 Pa. 223, 49 Atl. 796; *City of Huron v. Second Ward Savings Bank*, 86 Fed. 272, 30 C. C. A. 38, 49 L. R. A. 534.

## BORROWING MONEY

127. Express power to incur indebtedness by borrowing money on the municipal credit may be conferred upon a municipal corporation either by charter or by general law.

Like power may also be implied as appropriate and necessary for the proper and efficient exercise of the municipal powers expressly conferred upon the corporation.

Lacking express or implied power for such purposes, a municipality does not possess inherent power to incur municipal indebtedness by borrowing money on municipal credit.

Until the era of municipal extravagance had come to America, municipal corporations had been wont to borrow money, and give their notes or bonds therefor, without serious doubt or question as to the existence or source of such power; and it had accordingly been recognized in several cases that notes or bonds given by municipalities for money borrowed were valid municipal obligations.<sup>13</sup> And it is still generally, if not universally, conceded that a municipal corporation, under express authority or authority clearly implied, may incur indebtedness by borrowing money for municipal purposes.<sup>14</sup> But upon recent challenge it has been declared in the Supreme Court of the United States that the power to borrow money is not an incidental and necessary power of a municipal cor-

<sup>13</sup> City of Quincy v. Warfield, 25 Ill. 317, 79 Am. Dec. 330; De Voss v. City of Richmond, 18 Grat. (Va.) 388, 98 Am. Dec. 646, and note; President, etc., of Bank of Chillicothe v. Mayor, etc., of Town of Chillicothe, 7 Ohio, 31, pt. 2, 30 Am. Dec. 185; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721.

<sup>14</sup> City of Tyler v. L. L. Jester & Co. (Tex. Civ. App.) 74 S. W. 359; 1 Dill. Mun. Corp. §§ 117-120, and notes.

poration;<sup>15</sup> and that to create a valid indebtedness for money borrowed by a municipality there must exist either express authority, or the same must be clearly implied from granted powers.<sup>16</sup> To this view has been added the great weight of the opinion of Judge Dillon,<sup>17</sup> and the concurrence of some of the state Supreme Courts,<sup>18</sup> and it is probable that the preponderance of judicial opinion is against the inherent power of a municipality to borrow money. There are certain contrary decisions, however, which are irreconcilable with this view;<sup>19</sup> but many of the cases supposed to favor the inherent power of a corporation to borrow money will be found on close scrutiny, and limitation of the language to the facts of the cases, to be authority only for the doctrine that this power may be implied as necessary and proper to carry out the express powers conferred upon the municipality.<sup>20</sup> It is believed, therefore, that the great majority of the adjudged cases can

<sup>15</sup> Opinion of Bradley, J., in *Nashville v. Ray*, 19 Wall. (U. S.) 479, 22 L. Ed. 164.

<sup>16</sup> *Nashville v. Ray*, 19 Wall. (U. S.) 468, 22 L. Ed. 164. See, also, *Watson v. City of Huron*, 97 Fed. 449, 38 C. C. A. 264.

<sup>17</sup> 1 Dill. Mun. Corp. § 125.

<sup>18</sup> *Swackhamer v. Town of Hackettstown*, 37 N. J. Law, 191; *Robertson v. Breedlove*, 61 Tex. 316; *ALLEN v. INTENDANT AND COUNCILMEN OF CITY OF LA FAYETTE*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497, Cooley, Cas. Mun. Corp. 303.

The power to borrow money, incur indebtedness, and issue bonds on behalf of the people of the state or any subdivision thereof is the function of the Legislature to exercise itself, or to delegate to municipal or quasi municipal corporations. *Board of Com'rs of Seward County, Kan., v. Aetna Life Insurance Co.*, 90 Fed. 222, 32 C. C. A. 585.

<sup>19</sup> *Miller v. Board of Com'rs of Dearborn County*, 66 Ind. 162; *City of Williamsport v. Com. ex rel. Bair*, 84 Pa. 487, 24 Am. Rep. 208; *Com. ex rel. Reinboth v. Councils of Pittsburgh*, 41 Pa. 278; *President, etc., of Bank of Chillicothe v. Mayor, etc., of Town of Chillicothe*, 7 Ohio, 31, pt. 2, 30 Am. Dec. 185.

<sup>20</sup> *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *Clarke v. School Dist.*, 3 R. I. 199; *State v. Babcock*, 22 Neb. 614, 35 N. W. 941; *Curtis v. Leavitt*, 15 N. Y. 9; *City of Richmond v. McGirr*, 78 Ind. 192; *Wells v. Town of Salina*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759.

be reconciled upon the basis of the sound and safe doctrines stated in the heading of this section.

### MUNICIPAL BONDS—POWER TO ISSUE

128. Municipal bonds are now generally understood to mean negotiable bonds issued by a municipality as security for its indebtedness.
129. Authority to issue municipal bonds is not inherent in a municipality, but may be expressly conferred by the legislature, or may be implied as necessary to the exercise of the express powers.

Municipal bonds are not necessarily negotiable. They may in form lack some element of negotiability, or may include some phrase rendering them nonnegotiable. But the custom of making such bonds negotiable in form has become so prevalent as to be almost universal, and the term "municipal bonds" in modern parlance implies negotiability.<sup>21</sup> They are generally issued as security for a loan of money to the municipality. But sometimes they are used to subsidize a quasi public corporation engaged in some undertaking of advantage to the municipality, such as a railroad, gas, water, or electric company.

#### *Power to Issue*

The general subject of the power of a municipal corporation to issue bonds, like that of its power to borrow money, has undergone much judicial examination, and there are cases holding that the power to issue bonds is inherent in the municipality;<sup>22</sup> but most of these cases on examination will be found as sustaining rather the implied than the inherent power of a municipality to issue bonds, and it is believed that the

<sup>21</sup> Black, Law Dict. tit. "Municipal Bonds."

<sup>22</sup> Com. ex rel. Reinboth v. Councils of Pittsburgh, 41 Pa. 278; Clark v. City of Janesville, 10 Wis. 136.

great majority of the apparently conflicting decisions on this subject, as well as on the subject of borrowing money, may be reconciled upon the foregoing statement.<sup>23</sup> This power to issue negotiable paper will be implied from the express power to borrow money;<sup>24</sup> but the courts have been generally averse to any such implication where the bonds are to be used as municipal aid to the construction of a railroad, either by subscription to stock or purchase of bonds.<sup>25</sup> Usually the statute authorizing the issuance of such bonds provides for a submission of the question to popular vote, and authorizes their issuance only when favored by a majority of the electors or taxpayers of the municipality.

#### *Validity*

Municipal bonds, being generally issued for the purpose of obtaining a loan of money on favorable terms, are made payable to bearer and pass by delivery. They are therefore held free from all equities which might exist in favor of the corporation,<sup>26</sup> and the only defense open to the municipality is

<sup>23</sup> An inherent power exists in the municipality as an essential function of its corporate existence, and independent of its granted powers. *Smith v. City of Newbern*, 70 N. C. 14, 16 Am. Rep. 766.

<sup>24</sup> *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *De Voss v. City of Richmond*, 18 Grat. (Va.) 338, 98 Am. Dec. 646; *MERRILL v. TOWN OF MONTICELLO*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069, Cooley, Cas. Mun. Corp. 309.

<sup>25</sup> *Fisk v. City of Kenosha*, 26 Wis. 23; *Williamson v. City of Keokuk*, 44 Iowa, 88; *Pitzman v. Village of Freeburg*, 92 Ill. 111; *DODGE v. CITY OF MEMPHIS* (C. C.) 51 Fed. 165, Cooley, Cas. Mun. Corp. 317; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Mississippi, O. & R. R. R. Co. v. Mayor, etc., of City of Camden*, 23 Ark. 300; *Pennsylvania R. Co. v. City of Philadelphia*, 47 Pa. 189; *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. Ed. 356.

But in *Jennings Banking & Trust Co. v. Jefferson*, 30 Tex. Civ. App. 534, 70 S. W. 1005, it was held that where a city charter authorizes the issuance of bonds to aid in the construction of railroads to and from the city, the authority to issue bonds for the purchase of lands for depots would be implied. See *Wetzell v. City of Paducah* (C. C.) 117 Fed. 647.

<sup>26</sup> *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215, 65 N. E. 978.

want of authority for their issuance.<sup>27</sup> Upon this subject the same considerations are pertinent and rules applicable in regard to county bonds.<sup>28</sup>

### MUNICIPAL WARRANTS

130. The current indebtedness of a municipality is usually evidenced by warrants or orders, which the municipality has inherent power to issue through its officers.

Municipal orders or warrants are informal checks or drafts by one municipal officer upon another for the payment of a certain sum of money.<sup>29</sup> They do not constitute municipal securities, but are merely conveniences in municipal administration of its finances.<sup>30</sup> These warrants are usually not ne-

<sup>27</sup> Ante, § 24. *Clarke v. Town of Northampton*, 120 Fed. 661, 57 C. C. A. 123; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 950, 30 L. Ed. 911; *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3; *Everett v. Independent School Dist. of Rock Rapids* (C. C.) 109 Fed. 697; *Clifton Forge v. Alleghany Bank*, 92 Va. 283, 23 S. E. 284.

Where a municipality issues bonds which it had no authority to issue under its charter, it cannot subsequently validate its bonds by ratification. *Uncas Nat. Bank v. Superior*, 115 Wis. 340, 91 N. W. 1004.

<sup>28</sup> Post, § 180. *Fernald v. Gilman* (C. C.) 123 Fed. 797; *City of Defiance, Ohio, v. Schmidt*, 123 Fed. 1, 59 C. C. A. 159; *Rondot v. Rogers Tp.*, 99 Fed. 202, 39 C. C. A. 462; *Edwards v. Bates County* (C. C.) 117 Fed. 526; *City of Beatrice v. Edminson*, 117 Fed. 427, 54 C. C. A. 601; *King v. Superior*, 117 Fed. 113, 54 C. C. A. 499; *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167; *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390.

<sup>29</sup> *Clark v. City of Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *Bull v. Sims*, 23 N. Y. 570.

<sup>30</sup> *School Dist. Tp. v. Lombard*, 2 Dill. (U. S.) 493, Fed. Cas. No. 12,478; *Dana v. City and County of San Francisco*, 19 Cal. 486.

gotiable,<sup>31</sup> and do not bear interest.<sup>32</sup> They are not intended to be used as currency, though they are assignable;<sup>33</sup> but in the hands of any person the city is entitled to all equities against the original payee.<sup>34</sup> It is expected that they will be paid out of current taxes,<sup>35</sup> and therefore they rarely exceed them in amount. They may be the basis of action against the municipality, but not until after presentation for payment and refusal.<sup>36</sup>

<sup>31</sup> Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520; First Nat. Bank v. Gates, 66 Kan. 505, 72 Pac. 207, 97 Am. St. Rep. 383; City of Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784; Goodwin v. Town of East Hartford, 70 Conn. 18, 38 Atl. 876; Bardley v. Sternberg, 17 Wash. 243, 49 Pac. 499; Watson v. City of Huron, 97 Fed. 449, 38 C. C. A. 264; Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423.

<sup>32</sup> City of Pekin v. Reynolds, 31 Ill. 529, 83 Am. Dec. 244; South Park Com'rs v. Dunlevy, 91 Ill. 49.

They may, however, draw interest after presentation, demand for payment, and refusal. Fernandez v. City of New Orleans, 42 La. Ann. 1, 7 South. 57.

But see Kenyon v. City of Spokane, 17 Wash. 57, 48 Pac. 783; City of Quincy v. Warfield, 25 Ill. 317, 79 Am. Dec. 330.

<sup>33</sup> Grayson v. Latham, 84 Ala. 546, 4 South. 200; Clark v. Polk County, 19 Iowa, 248; Brown v. Town Board of School Directors of the Town of Jacobs, 77 Wis. 27, 45 N. W. 678.

<sup>34</sup> Gilman v. Township of Gilby, 8 N. D. 627, 80 N. W. 889, 73 Am. St. Rep. 791; Casey v. Pilkington, 83 App. Div. 91, 82 N. Y. Supp. 525; Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520; Speer v. Board of Com'rs, 88 Fed. 749, 32 C. C. A. 101; Matthis v. Inhabitants of Town of Cameron, 62 Mo. 504.

A holder of city warrants has only the rights of the original payee, since the rules pertaining to negotiable instruments do not apply. West Philadelphia Title & Trust Co. v. City of Olympia, 19 Wash. 150, 52 Pac. 1015.

<sup>35</sup> Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. Ed. 164; Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598.

<sup>36</sup> Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; Travelers' Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; Quaker City Nat. Bank of Philadelphia v. City of Tacoma, 27 Wash. 259, 67 Pac. 710; International Bank of St. Louis v. Franklin County, 65 Mo. 105, 27 Am. Rep. 261; Varner v. Inhabitants of Nobleborough, 2 Greenl. (Me.) 126, 11 Am. Dec. 48; City of Pekin v. Reynolds, 31 Ill. 529, 83 Am. Dec. 244.

## FUNDS

131. Municipal revenues are usually divided into funds which represent the various sums of money appropriated by the council for the payment of specified kinds of indebtedness; e. g., a school fund, interest fund, street fund, sinking fund, and the like.

The warrants of the municipality are usually drawn upon some special fund, and are to be paid out of that fund in the order in which they are presented and accepted by the disbursing officer.<sup>37</sup> If the fund be exhausted, such warrant is not then payable out of other money in the municipal treasury,<sup>38</sup> but may be payable out of the same fund the following year.<sup>39</sup>

### *Specific Funds*

These separate funds represent the assessment and appropriation of annual revenues to specific objects, and are severally devoted to those purposes.<sup>40</sup> The financial agents or officers of the corporation must administer those funds in accordance with the general rules of the council setting them

<sup>37</sup> Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251; La France Fire-Engine Co. v. Davis, 9 Wash. 600, 38 Pac. 154; Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520; Quaker City Nat. Bank of Philadelphia v. City of Tacoma, *supra*; Northwestern Lumber Co. v. City of Aberdeen, 22 Wash. 404, 60 Pac. 1115; Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598; Benson v. Inhabitants of Carmel, 8 Greenl. (Me.) 112.

<sup>38</sup> McCullough v. Mayor, etc., of City of Brooklyn, 23 Wend. (N. Y.) 458.

Warrants issued by a city for street improvements, to be paid out of a special fund, cannot be collected against the city generally, though the remedy to collect from the special fund is lost. Wilson v. City of Aberdeen, 19 Wash. 89, 52 Pac. 524.

<sup>39</sup> Western Town-Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982; Phillips v. Reed, 107 Iowa, 331, 76 N. W. 850.

<sup>40</sup> People v. Wood, 71 N. Y. 371; Bates v. Porter, 74 Cal. 224, 15 Pac. 732.

apart to specific purposes.<sup>41</sup> They have no power to divert these funds to different objects, and may be liable for so doing.<sup>42</sup>

### RIGHTS OF CREDITORS

132. Creditors may by contract obtain a vested interest in municipal funds so that the same cannot be taken from them either by municipal or legislative action.

It often happens in the administration of municipal affairs that contractors doing work of improvement for the municipality have been promised compensation out of certain municipal funds; or that a loan of money has been obtained upon the credit of some specific municipal fund; or that creditors of the municipality have been induced to refund their existing obligations at a lower rate of interest, or even to reduce the principal of the debt, upon guaranty of payment out of some specific source of municipal revenue. This stipulation may appear either in the contract or the municipal ordinance, or the statute under which the action is taken. In all such cases, unless the fund pledged is strictly governmental in its nature, so as to be incapable of being pledged,<sup>43</sup> the creditor obtains a vested interest in the fund,<sup>44</sup> which is protected by the con-

<sup>41</sup> Schultze v. Township of Manchester, 61 N. J. Law, 513, 40 Atl. 589; State ex rel. First Nat. Bank of York v. Cook, 43 Neb. 318, 61 N. W. 693; Boro v. Phillips County, 4 Dill. 216, Fed. Cas. No. 1,663; Priet v. Reis, 93 Cal. 85, 28 Pac. 798.

When a draft or warrant drawn by the proper officer, and in due form, is presented to a treasurer, it is no part of his duty to inquire into the legality of the consideration for which it was given. Wolf v. Oller, 16 Pa. Co. Ct. R. 235.

<sup>42</sup> Blair v. Lantry, 21 Neb. 247, 31 N. W. 790; City of East St. Louis v. Flannigan, 34 Ill. App. 596. See Bates v. Porter, 74 Cal. 224, 15 Pac. 732; Priet v. Reis, 93 Cal. 85, 28 Pac. 798.

<sup>43</sup> Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Davis v. Mayor, etc., of City of New York, 14 N. Y. 506, 67 Am. Dec. 186.

<sup>44</sup> Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L.

tract clause of the federal Constitution; and his right cannot be impaired by subsequent legislation, either by the state or the municipality.<sup>45</sup> Sinking funds have been held to be peculiarly within the protection of this constitutional provision, and any legislation void which tends to impair the creditor's contractual security.<sup>46</sup> The same doctrine may be applied with equal force to any other special municipal fund which has been likewise pledged as security for municipal debt,<sup>47</sup> though in some cases the creditor has been denied the full measure of this constitutional protection.<sup>48</sup> But a pledge of the entire municipal revenues, or of the ordinary revenues employed in performing strictly governmental functions, would be obviously void as an unwarranted surrender of sovereign power;<sup>49</sup> in other words, such a contract would be void as against public policy, and therefore not protected by the federal Constitution.<sup>50</sup>

Ed. 1090; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321.

<sup>45</sup> City of Memphis v. U. S. ex rel. Brown, 97 U. S. 293, 24 L. Ed. 920; SHAPLEIGH v. CITY OF SAN ANGELO, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310, Cooley, Cas. Mun. Corp. 319.

<sup>46</sup> Board of Liquidators of City Debts v. Municipality No. 1, 6 La. Ann. 21; Kelly v. City of Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.

<sup>47</sup> Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Galena v. Amy, 5 Wall. (U. S.) 705, 18 L. Ed. 560; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395.

<sup>48</sup> City of St. Louis v. Sheilds, 52 Mo. 351.

<sup>49</sup> Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Gale v. Village of Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; Brick Presbyterian Church Corp. v. Mayor, etc., of the City of New York, 5 Cow. (N. Y.) 538; Rittenhouse v. Mayor, etc., of Baltimore, 25 Md. 336; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

<sup>50</sup> Sandusky City Bank v. Wilbor, 7 Ohio St. 481; Brewster v. Hough, 10 N. H. 138; Lynn v. Polk, 8 Lea (Tenn.) 121; East Saginaw Mfg. Co. v. City of East Saginaw, 19 Mich. 259, 2 Am. Rep. 82; Brainard v. Town of Colchester, 31 Conn. 410; Wilmington & W. R. Co. v. Reid, 64 N. C. 226; Mott v. Pennsylvania Railroad Co., 30 Pa. 9, 72 Am. Dec. 664.

## EXPENSES

133. Municipal expenses include all such items as are incidental to the proper exercise of corporate functions in administering the government of the municipality, and, if within the scope of the municipal powers, are within the discretion of the governing body.

The details of administration in a municipality are so varied and numerous as to render classification or special regulation impossible. They are, however, generally committed to the discretion of the municipal council,<sup>51</sup> but in some instances to that of special officers.<sup>52</sup> For example, it has been held that a stenographer's fees for reporting, under the direction of the city attorney, the trial of a case against a police officer, was a proper item of municipal expense, though the city was not a party to the suit, since such matters must be left to the discretion of the city attorney, and he was acting within the apparent scope of his authority.<sup>53</sup> But the discretion vested in the council will not validate a claim for items of expenditure obviously not municipal, such as giving banquets,<sup>54</sup> providing entertainment for guests,<sup>55</sup> buying military uniforms,<sup>56</sup> expenses of delegates to a municipal convention,<sup>57</sup> and the like.<sup>58</sup>

<sup>51</sup> 1 Dill. Mun. Corp. § 94; Kendall v. Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118; White v. Mayor and Council of Decatur, 119 Ala. 476, 23 South. 999. Ante, § 45.

<sup>52</sup> Ante, § 25.

<sup>53</sup> City of Chicago v. Williams, 80 Ill. App. 33.

<sup>54</sup> Austin v. Coggeshall, 12 R. I. 329, 34 Am. Rep. 648; Commonwealth ex rel. v. Gingrich, 21 Pa. Super. Ct. 286.

<sup>55</sup> Black v. Common Council of City of Detroit, 119 Mich. 571, 78 N. W. 660.

<sup>56</sup> Claffin v. Inhabitants of Hopkinton, 4 Gray (Mass.) 502.

<sup>57</sup> Waters v. Bonvouloir, 172 Mass. 286, 52 N. E. 500.

<sup>58</sup> City of Tyler v. L. L. Jester & Co. (Tex.) 74 S. W. 359; State ex rel. Crow v. St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Matter of Town of Eastchester, 53 Hun, 181, 6 N. Y. Supp. 120;

## BUDGET

134. A classified statement of annual appropriation of municipal revenues, commonly called a "budget," is required in many states, as the measure of lawful municipal expenditures during the year.

The object of this budget, obviously, is to ensure an orderly, systematic, and economical administration of municipal affairs, and the executive officers of the municipality are required to conform their operations to this budget, and limit their expenditures to the sum appropriated to the various departments or kinds of municipal work.<sup>59</sup> But the courts of the various states express diverse views as to the object of such statute

*Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *The Liberty Bell*, (C. C.) 23 Fed. 843; *City of New London v. Brainard*, 22 Conn. 556; *Hodges v. City of Buffalo*, 2 Denio (N. Y.) 110; *Greenough v. Inhabitants of Wakefield*, 127 Mass. 275.

Where a city council, without authority, authorized the payment of a claim of a member for expenditures made by him in company with others on a trip to various cities investigating municipal affairs in pursuance of an ordinance, the city comptroller properly refused to approve a warrant drawn in payment of such claim. *James v. City of Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957.

But charges for labor and material furnished in the building of a city jail, services in guarding quarantined patients, publishing notice and printing ballots of election, feeding impounded stock, boarding city prisoners, insurance on city buildings, services in making assessment rolls, postage and stationery for officers, city printing and necessary expenses of the city clerk, are held valid, though the city had exceeded the limit of its indebtedness, as such were necessarily expenses incurred in maintaining its existence. *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189.

<sup>59</sup> *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. 295; *State ex rel. Barber Asphalt Pav. Co. v. City of New Orleans*, 40 La. Ann. 299, 3 South. 584. The amount placed on the budget for the annual expenses of a municipal corporation when collected by taxes levied therefor must be applied to the purposes specified in the budget. *Parish Board of School Directors v. City of Shreveport*, 47 La. Ann. 1810, 17 South. 823. See *Badger v. City of New Orleans*, 49 La. Ann. 804, 21 South. 870, 37 L. R. A. 540.

and the municipal power thereunder. In Illinois<sup>60</sup> and Colorado<sup>61</sup> municipalities are held to be limited in expenditure to the budget appropriations. In Connecticut<sup>62</sup> it is held that the statute is intended for protection of the city against its officers, and that the council may incur expenditures not provided for by the budget; and in Nebraska<sup>63</sup> the budget limit has been held not to include money authorized to be borrowed for specific purpose on sanction of the legal voters. It has also been held that unwarranted expenditures for municipal objects may be ratified by the council, and a claim therefor be thus validated.<sup>64</sup>

### CLAIMS

**135. Claims against a municipality ex contractu do not become actionable until after due and regular presentation and demand for payment, and refusal by the proper officer.**

While there is lack of entire uniformity in the decisions of the various states with regard to the enforcement of contractual claims against a municipality, the general doctrine based upon the nature of such claims and the necessities of municipal administration is as above stated.<sup>65</sup> In the manage-

<sup>60</sup> Culbertson v. City of Fulton, 127 Ill. 30, 18 N. E. 781.

<sup>61</sup> Sullivan v. City of Leadville, 11 Colo. 483, 18 Pac. 736.

<sup>62</sup> Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666.

<sup>63</sup> State ex rel. Fuller v. Martin, 27 Neb. 441, 43 N. W. 244.

<sup>64</sup> Barrett v. City of Mobile, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 54; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; City of St. Louis, to Use of Creamer, v. Clemens, 52 Mo. 133; Burrill v. Boston, 2 Cliff. 590, Fed. Cas. No. 2,198; Kunkle v. Town v. Franklin, Wright County, 13 Minn. 127 (Gil. 119), 97 Am. Dec. 226; Bolles v. Brimfield, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786.

But where it is in excess of the constitutional limitation it cannot be ratified. Balch v. Beach, 119 Wis. 77, 95 N. W. 132.

See, also, McGillivray v. Joint School District, 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100, 88 Am. St. Rep. 969.

<sup>65</sup> Burdick v. Richmond, 16 R. I. 502, 17 Atl. 917; Trustees v. White, 48 Ohio St. 577, 29 N. E. 47; Jones v. City of Albany, 62

nient of municipal affairs some officer is intrusted with the duty of auditing claims; and when the claims are approved, or an accord has been reached, warrants are drawn for payment upon the municipal treasury. After such warrant has been presented and payment refused, the claimant has a right of action thereon;<sup>66</sup> but the warrant is not conclusive upon either party.<sup>67</sup> The municipality may defend against the warrant upon the ground that the claim was ultra vires, fraudulent, or unfounded;<sup>68</sup> and the claimant, at any time before assigning or receiving payment of the warrant, may waive this acknowledgment of indebtedness and sue the municipality upon his original claim.<sup>69</sup> After payment of the warrant neither party can have any action upon the subject-matter, except upon grounds of equity which will warrant the unsettling of a liquidated claim.<sup>70</sup> The creditor having a warrant upon a special fund may demand payment out of the same, and if payment is refused he may enforce it by mandamus.<sup>71</sup>

Hun, 353; 17 N. Y. Supp. 232; Bass Foundry & Machine Works v. Board of Com'rs of Parke County, 115 Ind. 234, 17 N. E. 593.

<sup>66</sup> City of Pekin v. Reynolds, 31 Ill. 529, 28 Am. Dec. 244; Varner v. Inhabitants of Nobleborough, 2 Me. (2 Greenl.) 126, 11 Am. Dec. 48; Saunders v. City of Fitzgerald, 113 Ga. 619, 38 S. E. 978.

<sup>67</sup> ALLEN v. INTENDANT AND COUNCILMEN OF CITY OF LA FAYETTE, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497, Cooley, Cas. Mun. Corp. 303; Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; Taft v. Town of Pittsford, 28 Vt. 286; Varner v. Inhabitants of Nobleborough, *supra*.

<sup>68</sup> Trowbridge v. Schmidt, 82 Miss. 475, 34 South. 84; Nashville v. Ray, 19 Wall. (U. S.) 468; 22 L. Ed. 164; Cheeney v. Inhabitants of Town of Brookfield, 60 Mo. 53; Salamanca Tp. v. Jasper County, Mo., Bank, 22 Kan. 696; First Nat. Bank of Balston Spa v. Board of Supervisors, 106 N. Y. 488, 13 N. E. 439; Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423.

<sup>69</sup> Crawford County v. Wilson, 7 Ark. 214; Dalrymple v. Town of Whitingham, 26 Vt. 347; Dyer v. Covington Tp., 19 Pa. 200; Varner v. Inhabitants of Nobleborough, *supra*; ALLEN v. INTENDANT AND COUNCILMEN OF LA FAYETTE, *supra*.

<sup>70</sup> Sweet v. Carver County Com'rs, 16 Minn. 106 (Gil. 96); Crawford County v. Wilson, *supra*; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 72 Am. St. Rep. 870.

<sup>71</sup> Ray v. Wilson, 29 Fla. 342, 10 South. 613, 14 L. R. A. 773; State

**APPROPRIATION**

136. **Appropriation**, being the authoritative application by the council of municipal revenues to a distinct object or definite purpose, fixes the rule of action governing all officers in the handling and disbursement of the municipal revenues.

The classification of municipal funds with reference to the various departments of municipal business, being essentially for orderly administration, the legislative act of appropriation operates to devote the municipal funds to the specific objects, and to require of all officers handling municipal funds a strict compliance with the municipal ordinance.<sup>72</sup> No discretion is left to the financial officer in disbursing the municipal reve-

ex rel. Moore v. Gandy, 12 Neb. 232, 11 N. W. 296; People v. Wendell, 71 N. Y. 171; Bush v. Geisy, 16 Or. 355, 19 Pac. 123; German-American Sav. Bank of Burlington v. City of Spokane, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259; Wilson v. City of Aberdeen, 19 Wash. 89, 52 Pac. 524; Northwestern Lumber Co. v. City of Aberdeen, 22 Wash. 404, 60 Pac. 1115 (in which it was held that a city is liable in damages to a holder of its warrants, payable out of a special assessment to be collected by the city, for the payment of warrants of subsequent issue and number before those of such holder); City of Greencastle v. Allen, 43 Ind. 347; Voorhies v. Mayor, etc., of Houston, 70 Tex. 331, 7 S. W. 679.

Where warrants are drawn against a city with an express provision that they shall be payable from a special fund to be raised by levy on certain lands, the holder must resort to mandamus to compel such levy, and cannot compel the city to pay the same out of the general funds, unless the levy has been made, and the money to pay the warrants is in the city treasury. Turner v. Guthrie, 13 Okl. 26, 73 Pac. 283.

But the holder of warrants need not resort to mandamus to compel the treasurer to act, an action at law against the city being maintainable. First Nat. Bank of Northampton, Mass., v. Arthur, 10 Colo. App. 283, 50 Pac. 738; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898; Goldsmith v. City of Baker City, 31 Or. 249, 49 Pac. 973; Travelers' Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556.

<sup>72</sup> Baker v. City of Seattle, 2 Wash. 576, 27 Pac. 462.

nues;<sup>73</sup> the funds appropriated to a specific object must be applied solely to it.<sup>74</sup> The duties of the disbursing officer are purely ministerial, and his only safety is in obedience to the appropriation.<sup>75</sup> It has been held competent for the council or for the legislature to amend the ordinance of appropriation and divert the funds to other municipal objects when this does not impair a contract obligation.<sup>76</sup> Whatever be the statute or ordinance of appropriation, the disbursing officer must act in obedience to it.<sup>77</sup>

<sup>73</sup> First Nat. Bank of Northampton, Mass., v. Arthur, 10 Colo. App. 283, 50 Pac. 738; State ex rel. First Nat. Bank of York v. Cook, 43 Neb. 318, 61 N. W. 693; Flick v. Harpham, 13 Pa. Co. Ct. R. 648; City of Bonham v. Taylor, 81 Tex. 59, 16 S. W. 555; Wilson v. Neal (C. C.) 23 Fed. 129.

<sup>74</sup> Affeld v. City of Detroit, 112 Mich. 560, 71 N. W. 151; Priet v. Reis, 93 Cal. 85, 28 Pac. 798.

<sup>75</sup> Nolan County v. Simpson, 74 Tex. 218, 11 S. W. 1098; State v. Corning, 44 Kan. 442, 24 Pac. 966.

<sup>76</sup> Creighton v. Board of Sup'rs of City and County of San Francisco, 42 Cal. 446; Crittenden County Court v. Shanks, 88 Ky. 475, 11 S. W. 468; Board of Sup'rs of Sangamon County v. City of Springfield, 63 Ill. 66; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

<sup>77</sup> City of East St. Louis v. Flannigan, 34 Ill. App. 596; Dorsey County v. Whitehead, 47 Ark. 205, 1 S. W. 97.

## CHAPTER XIV

### TAXATION

- 137. Source of Power.
- 138. Legislative Control.
- 139-141. Public Purpose Only.
- 142. Apportionment of Taxes.
- 143. Subjects of Taxation.
- 144. State May Impose.
- 145. Limitation of Express Power.
- 146. Implied Power.
- 147. License Tax.
- 148. Exercise of Power.
- 149. Assessment and Collection.
- 150. Taxation for Creditors.

### SOURCE OF POWER

137. Taxation is an attribute of sovereignty. The power is not an essential function of a municipal corporation, but may be delegated to it by the state, either expressly or by necessary implication.

Government implies expenditure of money. Expenditures demand revenue. Revenue requires taxation. Taxation is inherent in the state, as an essential attribute of sovereignty.<sup>1</sup> It is the method whereby those receiving the protection of government are compelled to contribute to its support. It is primarily a legislative function, and all taxation is based upon legislative authority;<sup>2</sup> but the Legislature may delegate this power to local subdivisions of the state as governmental agen-

<sup>1</sup> *State v. Bristol*, 109 Tenn. 315, 70 S. W. 1031; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939.

<sup>2</sup> The only warrant for the imposition of a tax or burden upon the citizen or his property without his consent must be found in some positive law, and it cannot be enforced unless imposed in the man-

cies,<sup>3</sup> and thus empower them to perform this sovereign function. Few, if any, American municipalities exist without this power, but it is not inherent in a municipality as an essential attribute of incorporation.<sup>4</sup> The state might incorporate a

ner authorized by statute. *Queens County Water Co. v. Monroe*, 83 App. Div. 105, 82 N. Y. Supp. 610.

The power of taxation is purely legislative, and the courts cannot inquire into the necessity of a tax levy made by a municipality within the limits prescribed by the Constitution. *Mayfield Woolen Mills v. Mayfield*, 111 Ky. 172, 61 S. W. 43, 22 Ky. Law Rep. 1676.

The legislative power is supreme in the selection of objects for taxation, determining the amount of taxes to be levied thereon and the purposes thereof, subject to the constitutional limitation that taxes can be imposed only for public purposes, and that taxation must be uniform. *State ex rel. Ellis v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

See Cooley, *Const. Lim.* (6th Ed.) 587.

<sup>3</sup> *Smith v. Howell*, 60 N. J. Law, 384, 38 Atl. 180; *Pioneer Iron Co. v. City of Negaunee*, 116 Mich. 430, 74 N. W. 700; *Carter v. Wade*, 59 N. J. Law, 119, 35 Atl. 649; *Grunewald v. Cedar Rapids*, 118 Iowa, 222, 91 N. W. 1059; *STATE ex rel. HOWE v. CITY OF DES MOINES*, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157, Cooley, *Cas. Mun. Corp.* 325; *Edgerton v. Goldsboro Water Co.*, 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444; *Wells v. City of Savannah*, 107 Ga. 1, 32 S. E. 669.

A state, having power to tax property for state purposes, may confer on one of its municipalities the power to tax the same property for local purposes. *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823; *Hope v. Deaderick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Rogers v. Burlington*, 3 Wall. (U. S.) 663, 18 L. Ed. 79; *Langhorne v. Robinson*, 20 Grat. (Va.) 661; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Daily v. Swope*, 47 Miss. 367; *Whiting v. Town of West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750, note.

But the power of taxation may not be delegated to any special committee. *Keeler v. Westgate*, 10 Pa. Dist. R. 240.

<sup>4</sup> Cooley, *Tax'n* (2d Ed.) 484; *Town of Drummer v. Cox*, 165 Ill. 648, 46 N. E. 716; *Minot v. Inhabitants of West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *State ex rel. Aull v. Shortridge*, 56 Mo. 126; *State ex rel. Atkins v. Town of Maysville*, 12 S. C. 76; *Lott v. Ross*, 38 Ala. 156; *Vance v. City of Little Rock*, 30 Ark. 435; *Green v. Ward*, 82 Va. 324; *Clark v. City of Davenport*, 14 Iowa, 494; *Taylor v. Donner*, 31 Cal. 480; *Commissioners of Town of Asheville v. Means*, 29 N. C. 406; *Burnes v. Mayor, etc., of Atchison*, 2 Kan. 454; *In re Second Ave. M. E. Church*, 66 N. Y. 395; *City of Fairfield v. Rat-*

municipality, and supply it with revenue out of its own treasury to meet the expenditures necessary for the performance of its municipal functions. But the rule is otherwise in America, and the almost universal custom is to confer upon a municipality the power of taxation. This may be granted in express terms, or it may be implied as necessary for the exercise of the powers expressly granted.<sup>5</sup> Thus, if a municipality is expressly authorized to borrow money, the power to levy taxes to raise revenue to meet the obligation is necessarily implied.<sup>6</sup> The exercise of this power by municipalities in America is in strict accordance with the Anglo-Saxon instinct of home rule, and the genius of our free institutions.

### LEGISLATIVE CONTROL

**138. The power of municipal taxation is subject to the sovereign will, and may be granted, enlarged, abridged, or revoked when and as the Legislature shall deem best.**

Since taxation is a sovereign power, a municipality, being a dependent and derivative body, cannot hold such power in perpetuity.<sup>7</sup> It is entirely subject to the legislative control. The Legislature, at the creation of the corporation, may grant

cliff, 20 Iowa, 396; *Henderson v. Mayor, etc., of Baltimore, to Use of Eschbach*, 8 Md. 352. But see *United States ex rel. Ranger v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

<sup>5</sup> *State v. Bristol*, 109 Tenn. 315, 70 S. W. 1031; *Howell v. City of Buffalo*, 15 N. Y. 512; *Mays v. City of Cincinnati*, 1 Ohio St. 268; *City of Philadelphia v. Flanigen*, 47 Pa. 21; *Commissioners of Town of Asheville v. Means*, 29 N. C. 406; *Ham v. Sawyer*, 38 Me. 37.

<sup>6</sup> *Slocomb v. City of Fayetteville*, 125 N. C. 362, 34 S. E. 436; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Wright v. City of Chicago*, 20 Ill. 252; *Mayor, etc., of City of Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

<sup>7</sup> *City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; *Williamson v. New Jersey*, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

or withhold this power, as to it shall seem best. It may give a small or large measure of the power; and after the original grant it may enlarge, curtail, or wholly revoke it, subject only to the vested rights of creditors.<sup>8</sup>

Thus the Legislature cannot so limit the taxing power as to preclude it from raising funds necessary to satisfy pre-existing legal indebtedness.<sup>9</sup> On the other hand, it cannot compel the taxation of city property for local purposes without the consent of the freemen of the city.<sup>10</sup> But, generally speaking, the municipality is the agent only. The state is the principal; and it is for the principal, not for the agent, to determine the nature, number, and extent of the powers to be exercised by the agent.<sup>11</sup>

<sup>8</sup> *Broughton v. Pensacola*, 92 U. S. 266, 23 L. Ed. 896; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. Ed. 296; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. Ed. 403; *United States ex rel. Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Commonwealth ex rel. Claghorn v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530.

<sup>9</sup> *Hammond v. Place*, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543.

<sup>10</sup> *Blades v. Board of Water Com'rs of City of Detroit*, 122 Mich. 366, 81 N. W. 271.

<sup>11</sup> *City of St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 89; *Spaulding v. City of Lowell*, 23 Pick. (Mass.) 71; *Fitch v. Pinckard*, 4 Scam. (Ill.) 78; *State v. Bristol*, 109 Tenn. 315, 20 S. W. 1031.

**PUBLIC PURPOSE ONLY**

139. Taxes may be levied by a municipality for public purposes only.
140. Whether the purpose is public or private is for ultimate decision by the courts.
141. A general concurrence of judicial opinion includes among public purposes of municipalities:
  - (1) The administration of justice.
  - (2) The preservation of peace and order.
  - (3) The protection of property.
  - (4) The facilitation of locomotion and transportation.
  - (5) The preservation of the public health.
  - (6) The support of public education.
  - (7) The promotion of public comfort.
  - (8) The care of the helpless.
  - (9) The reward of civic fidelity and heroism.

The Legislature is the exclusive judge as to the rate of taxation to be imposed upon the state by itself;<sup>12</sup> and such measure of taxing power as it possesses it may confer upon a municipality.<sup>13</sup> The only limit, therefore, as to the amount of municipal taxes to be raised for municipal purposes must be found in the civic conscience and sense of responsibility of the governing body of the municipality. The citizens have

<sup>12</sup> McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 428-430, 4 L. Ed. 579; Weston v. Charleston, 2 Pet. (U. S.) 449, 7 L. Ed. 481; Providence Bank v. Billings, 4 Pet. (U. S.) 514, 561, 7 L. Ed. 939; Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521; Sharpless v. Mayor, etc., of City of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Herrick v. Town of Randolph, 13 Vt. 525; People v. Mayor, etc., of City of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Wingate v. Sluder, 51 N. C. 552.

<sup>13</sup> Baldwin v. City Council of Montgomery, 53 Ala. 437; Bradley v. McAtee, 7 Bush (Ky.) 667, 3 Am. Rep. 309; Harrison v. Mayor, etc., of City of Vicksburg, 3 Smedes & M. (Miss.) 581, 41 Am. Dec. 633; City of Logansport v. Seybold, 59 Ind. 225.

entrusted the governing bodies with this power, and they may exercise it to the full legislative limit, provided, always, that they employ it only for public purposes.<sup>14</sup> If the power is perverted to private purposes, it is no longer taxation; it is extortion.<sup>15</sup> And it matters not whether the malversation is in small or in large sums; it is an abuse of sovereign power, amounting to robbery under the forms of law. The touchstone of all taxation, municipal and state, in our country, is not, then, the rate of the levy, but the object of the appropriation.<sup>16</sup> So long as the public is to be the beneficiary, it is lawful taxation; but when it is perverted to personal uses it is lawless confiscation; and this is true whether it be done openly, and in defiance of the public right (which is rare), or se-

<sup>14</sup> *United States v. Capdevielle*, 118 Fed. 809, 55 C. C. A. 421; *Baltimore & O. S. W. R. Co. v. People*, 200 Ill. 623, 66 N. E. 246; *MANNING v. CITY OF DEVILS LAKE*, 13 N. D. 47, 99 N. W. 51, 65 L. R. A. 187, 112 Am. St. Rep. 652, Cooley, Cas. Mun. Corp. 332; *Elting v. Hickman*, 172 Mo. 237, 72 S. W. 700; *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 79 N. W. 422; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Wilkinson v. Cheatham*, 43 Ga. 258; *Brewer Brick Co. v. Inhabitants of Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Curtis' Adm'r v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *City of Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39; *People ex rel. Doyle v. Austin*, 47 Cal. 353.

The power of the legislature to levy or to authorize the levy of a tax, and to create or to authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose. *Dodge v. Mission Tp., Shawnee County, Kan.*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242; *Sutherland-Innes Co. v. Village of Evart*, 86 Fed. 597, 30 C. C. A. 305.

See *Phoenix Assur. Co. of London v. Fire Dept. of City of Montgomery*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

<sup>15</sup> *In re Washington Ave.*, 69 Pa. 352, 8 Am. Rep. 255; *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *Morford v. Unger*, 8 Iowa, 82; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Sharpless v. Mayor, etc., of City of Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759.

<sup>16</sup> *Hitchcock v. City of St. Louis*, 49 Mo. 484; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *In re Central Park Com'rs*, 63 Barb. (N. Y.) 282; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *State ex rel. Griffith v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99.

cretly, under plausible pretext of public benefit (which has not been uncommon in American municipalities).

### *Judicial Question*

The question whether the purpose for which a tax is levied is public or private is to be determined ultimately by the courts. This wholesome rule of law is the sure safeguard of citizens against lawless oppression. If the Legislature or common council having unlimited power to levy taxes for public purposes, had also unlimited power to determine what was a public use, there would be no protection for private property in state or city.<sup>17</sup> Taxes could be levied and appropriated ad libitum, and the citizens might be at the mercy of faithless representatives. The facts of any case being conceded or proven, it is then for the courts to declare the law; and, while the common council of a municipality are empowered in the first instance to express their view of the nature of the tax, their opinion is not conclusive, but may be subjected to the ultimate test of judicial determination.<sup>18</sup> If it be doubtful whether the purpose is public or private, if the courts cannot plainly see that the appropriation is a perversion of public power to personal uses, they will resolve the doubt in favor

<sup>17</sup> *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455; *Tyler v. Beacher*, 44 Vt. 651, 8 Am. Rep. 398; *People v. Flagg*, 46 N. Y. 401; *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *Curtis' Adm'r v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Crowell v. Hopkinton*, 45 N. H. 9; *Morford v. Unger*, 8 Iowa, 82; *Sharpless v. Mayor*, etc., of City of Philadelphia, *supra*.

<sup>18</sup> *Ryerson v. Utley*, 16 Mich. 269; *Booth v. Town of Woodbury*, 32 Conn. 118; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Grim v. Weissenberg School Dist.*, 57 Pa. 433, 98 Am. Dec. 237; *Yale University v. Town of New Haven*, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

The decision of the question whether a tax or a public debt is for a public or private purpose is not legislative, but a judicial function. A Legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose. *Dodge v. Mission Tp.*, *Shawnee County, Kan.*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

of the legislative power, and sustain the facts.<sup>19</sup> But if it is obvious that the taxation is intended not for public, but for private, use, no sense of due respect for the co-ordinate branch of government will deter them from declaring such legislation unconstitutional, and such taxation null and void.<sup>20</sup> It has accordingly been held that public moneys in a town treasury cannot be distributed among "the inhabitants of the town according to families";<sup>21</sup> also that the credit of a town cannot be loaned to a manufacturing firm to induce the location of a manufacturing plant in the town;<sup>22</sup> also that a tax on a foreign insurance company for the benefit of disabled firemen was void.<sup>23</sup>

On the same principle the proposed issuance of \$20,000,000 worth of bonds by the city of Boston to raise money to loan to lot owners for the purpose of rebuilding in the burnt dis-

<sup>19</sup> *Brodhead v. City of Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Litchfield v. Vernon*, 41 N. Y. 123; *Tyson v. School Directors of Halifax Tp.*, 51 Pa. 9; *Ferguson v. Landram*, 5 Bush (Ky.) 230, 96 Am. Dec. 350; *Freeland v. Hastings*, 10 Allen (Mass.) 570.

<sup>20</sup> *Dodge v. Mission Tp.*, Shawnee County, Kan., *supra*; *Sharpless v. Mayor, etc., of City of Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Feldman v. City Council of Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Glasgow v. Rowse*, 43 Mo. 479; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *People ex rel. Doyle v. Austin*, 47 Cal. 360; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 22 L. Ed. 455.

<sup>21</sup> *Hooper v. Emery*, 14 Me. 379.

<sup>22</sup> *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Osborne v. Adams County*, 109 U. S. 1, 3 Sup. Ct. 150, 27 L. Ed. 835; *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *Mather v. City of Ottawa*, 114 Ill. 659, 3 N. E. 216; *Attorney General v. City of Eau Claire*, 37 Wis. 400.

<sup>23</sup> *Philadelphia Ass'n for Relief of Disabled Firemen v. Wood*, 39 Pa. 73.

But an act requiring insurance companies to pay an annual fee to the fire department of Montgomery to enable it to reward superior skill and exertion in its members and provide for sick or disabled members or their families was held not unconstitutional as imposing a tax for private purposes, even though the fire department be the direct recipient of it. *Phoenix Assur. Co. of London v. Fire*

trial in the city after the great fire of 1872 was declared to be null and void.<sup>24</sup> The same ruling had been previously made upon a similar act of the legislature of South Carolina in regard to the city of Charleston after the fire of 1866.<sup>25</sup> And an act providing for a tax to defray the expenses incurred in defending unsuccessful prosecutions against city officers for official misconduct was held invalid, as being an attempted exercise of the police power for a private purpose.<sup>26</sup> And so an act providing for the appropriation of a sum for the treatment of habitual drunkards in private institutions at the expense of the county was held unconstitutional, as being the imposition of a tax for private purposes.<sup>27</sup>

#### *What Purposes are Public*

The question of what is a public and what a private purpose has been repeatedly before the Supreme Courts of the various states in divers forms, and there is apparent inconsistency in the decisions. This has resulted in some states from failure of the Constitution to forbid the Legislature authorizing municipalities to loan credit to and exempt from taxation industrial enterprises of various kinds. But where there is express constitutional provision declaring and enforcing the rule of uniform and equal taxation, public purposes only have been generally, if not universally, recognized and sustained as the basis of the power; and in declaring what are public purposes the courts have not been inclined to confine their vision to a narrow view, but have generally adopted and followed the opinion of Judge Black in the celebrated case of *Sharpless v. City of Philadelphia*.<sup>28</sup>

Dept. of City of Montgomery, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

<sup>24</sup> *Lowell v. City of Boston*, 111 Mass. 463, 15 Am. Rep. 39.

<sup>25</sup> *Feldman v. City Council of Charleston*, 23 S. C. 57, 55 Am. Rep. 6.

<sup>26</sup> *In re Jensen*, 44 App. Div. 509, 60 N. Y. Supp. 933.

<sup>27</sup> *State ex rel. Garrett v. Froehlich*, 118 Wis. 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985.

<sup>28</sup> 21 Pa. 147, 59 Am. Dec. 759.

The substance of this decision is thus felicitously stated by an author of repute:<sup>29</sup> "Taxes may be imposed for roads of all kinds, canals, and bridges, that there may be facilities for transportation of freight and for travel; for public schools or colleges, that the people may be educated; for public libraries, that their means of improvement may be increased; for the poor, the dumb, the blind, the insane, lest they suffer from want; for the police of the state, in regulations for the preservation of health or the detection of crime; for courts of law, that individual rights may be protected and enforced, and that crime, when detected, may receive its fitting punishment; for the preservation of peace and the protection of the country from foreign enemies; to aid, encourage, and stimulate commerce, domestic and foreign, by the establishment of mints, postal system, and maintaining navies to keep open the highway of nations; to encourage citizens in the defense of their country by suitable rewards and mementos for past services in times of war, or by bounties for enlistment for future services; and for the promotion of the arts and sciences. For all these matters taxes may be imposed. The purpose is public. The object is governmental. The money raised and property purchased is held by the agents of the state for the state. The object is so to regulate the state that all its citizens may enjoy their lives, liberty, and property, and pursue their happiness according to the dictates of their own reason."

In many cases taxation has been upheld which would result in private benefit because the purpose of the taxation was public, and in other's taxation which would confer public benefit has been annulled because the obvious purpose of the levy was private. The rule governing the courts in all these cases seems to be that incidental benefits are not to decide the fate of a tax levy, but the obvious purpose of the taxation is to form the basis of the decision.<sup>30</sup>

<sup>29</sup> Burroughs, Tax'n, § 25.

<sup>30</sup> Allen v. Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185; Weeks v. City of Milwaukee, 10 Wis. 242; Citizens' Savings & Loan Ass'n

## APPORTIONMENT OF TAXES

142. The apportionment of the levy is an essential feature in the sovereign attribute of taxation, and may be exercised by the municipality as well as by the state.

Taxation is a burden to be borne for benefits conferred.<sup>31</sup> The general benefit accruing to citizens from good government calls for contributions from all in proportion to their ability to pay. This is usually determined by the value of their property which receives the protection of government. Special benefits, however, conferred by the state upon particular localities at extraordinary expense, ought not to be paid for by all the citizens of the state, but the expense thereof should in

v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Booth v. Town of Woodbury, 32 Conn. 118; Mills v. Charleton, 29 Wis. 411, 9 Am. Rep. 578. Tax for construction of subway held valid, Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; support of poor, Louisville & N. R. Co. v. Pendleton County, 96 Ky. 491, 29 S. W. 324; Elizabethtown Water Co. v. Wade, 59 N. J. Law, 78, 35 Atl. 4; Maydwell v. Louisville, 116 Ky. 885, 76 S. W. 1091, 25 Ky. Law Rep. 1062, 63 L. R. A. 655, 105 Am. St. Rep. 245.

A tax imposed for the purpose of aiding an exposition was held constitutional, as being for the promotion of the public welfare. State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am. St. Rep. 629. But see Hayes v. Douglas County, 92 Wis. 429, 65 N. W. 482, 51 L. R. A. 213, 53 Am. St. Rep. 926.

In Missouri, an act imposed a collateral succession tax to create a fund for maintaining free scholarships in the university, distributed throughout the state on competitive examination to applicants without means. It was held to be for purely private purposes, and void. State ex rel. Garth v. Switzler, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653; Same v. Rassieur, Id. And so an act providing that the manufacturers of patent medicine should pay a license, which should be turned into a fund for maintaining free scholarships in the State University for students. C. F. Simmons Medicine Co. v. Ziegenhein, 145 Mo. 368, 47 S. W. 10.

<sup>31</sup> Montesquieu, Spirit of Laws, b. 12, c. 30; Marshall, C. J., in Providence Bank v. Billings, 4 Pet. (U. S.) 561, 7 L. Ed. 939; Mills, Pol. Econ. 370-372; 2 Bouv. Law Dict. tit. "Taxes."

justice fall upon those who receive the benefits.<sup>82</sup> Municipalities, therefore, which receive special grants of power, enabling them to obtain particular advantages over the unincorporated portions of the state, are properly taxed with the extraordinary expense of conferring these benefits.<sup>83</sup>

#### *Taxation and Apportionment Inseparable*

The power of taxing and the power of apportioning taxation are inseparable; the former, indeed, includes the latter, and the state may either itself make the apportionment of extraordinary expense for local benefit, or it may confer the power upon the public corporation of the locality.<sup>84</sup> The latter method is commonly pursued, and thus municipalities are authorized to decide in what measure they will exercise the powers conferred upon them, and what amount of expense within legislative limits they will incur therefor.<sup>85</sup> All general improvements in a municipality are paid for out of the municipal treasury;<sup>86</sup> but in the municipality, just as in the state, inequalities of benefit in the improvements of divers localities call for unequal burdens of taxation. Those who re-

<sup>82</sup> Ruggles, J., in *People v. Mayor, etc., of City of Brooklyn*, 4 N. Y. 419, 428, 55 Am. Dec. 266; *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Dorgan v. City of Boston*, 12 Allen (Mass.) 223; *Hammett v. City of Philadelphia*, 65 Pa. 148, 3 Am. Rep. 615; *Neenan v. Smith*, 50 Mo. 525.

<sup>83</sup> *Gordon v. Cornes*, 47 N. Y. 608; *City of Philadelphia v. Field*, 58 Pa. 320; *Shaw v. Dennis*, 5 Gilman (Ill.) 405; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Brewster v. City of Syracuse*, 19 N. Y. 116.

<sup>84</sup> *Hope v. Deaderick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Speer v. Mayor, etc., of City of Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103; *Cooley, Cas. Mun. Corp.* 36; *Battle v. Corporation of Mobile*, 9 Ala. 234, 44 Am. Dec. 438; *Harrison v. Mayor, etc., of City of Vicksburg*, 3 Smedes & M. (Miss.) 581, 41 Am. Dec. 633; *City of Evansville v. State ex rel. Blend*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

<sup>85</sup> *People v. Flagg*, 46 N. Y. 401; *Hammett v. City of Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *City of Ottawa v. Spencer*, 40 Ill. 211; *Kansas City v. Baird*, 98 Mo. 215, 11 S. W. 562.

<sup>86</sup> *Taylor v. Chandler*, supra; *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428.

ceive special benefits in a municipality are therefore liable to special burdens of taxation, and the same power of apportionment existing in the state government is likewise recognized in municipal government.<sup>87</sup> This question has been more fully considered in the chapter on Improvements.<sup>88</sup>

### SUBJECTS OF TAXATION

**143. The power of municipal taxation extends over all persons and property within municipal boundaries, and in certain instances also to adjacent realty.**

Municipal taxation, being for municipal benefit, has for its subjects all goods and chattels, lands and tenements, within the municipal boundaries,<sup>89</sup> subject, of course, to such limita-

<sup>87</sup> *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *In re Washington Ave.*, 69 Pa. 352, 8 Am. Rep. 255; *Chamberlain v. City of Cleveland*, 34 Ohio St. 551.

<sup>88</sup> See ante, § 91.

<sup>89</sup> *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823; *In re Jones' Estate*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; *City of Hughes v. Carl*, 106 Ky. 533, 50 S. W. 852; *Louisville Trust Co. v. City of Louisville (Ky.)* 42 S. W. 340; *City of Richmond v. Gibson (Ky.)* 46 S. W. 702; *Lamson Consol. Store Service Co. v. City of Boston*, 170 Mass. 354, 49 N. E. 635; *Buck v. Miller*, 147 Ind. 586, 47 N. E. 8, 37 L. R. A. 384, 62 Am. St. Rep. 436; *Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. S71; *People ex rel. T. Martin Bros. Mfg. Co. v. Barker*, 14 Misc. Rep. 382, 36 N. Y. Supp. 76.

The franchises of a corporation exercised and enjoyed by it in a city are property within the provisions of a city's charter requiring a tax on all property in it. *Southwestern Telegraph & Telephone Co. v. San Antonio*, 32 Tex. Civ. App. 101, 73 S. W. 859.

In assessing property for taxation the dominant idea is that needful revenues shall be raised by levying a tax on property for valuation in such manner that every owner of property subject to taxation shall pay taxes in proportion to the value of the property owned. *State ex rel. Bee Bldg. Co. v. Savage*, 65 Neb. 714, 91 N. W. 716.

A city has no power to exempt taxable property within its limits from municipal taxation, and it can neither bind itself not to im-

tions and restrictions as may be contained in the grant of power.<sup>40</sup> In general, the rate of assessment upon all lands

pose taxes on particular property nor to impose them only under given limitations. *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 South. 416, 63 Am. St. Rep. 202.

An agreement of a city to release property from taxation on consideration of permission to construct sewers across the land is void, as being beyond the power of the city. *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

A positive direction in the Constitution as to what property shall be exempt contains an implication against an exemption of any other property by the Legislature. *State v. Armstrong*, 17 Utah, 166, 53 Pac. 981, 41 L. R. A. 407; *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243.

*Carriger v. Mayor, etc., of Town of Morristown*, 1 Lea (Tenn.) 118. A municipal corporation may not exempt any property in its boundaries from taxation, unless the Legislature, in the exercise of constitutional authority so to do, expressly clothes it with the power to make exemption; and then the municipal action must be clearly within the power conferred. *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939; *City of South Bend v. University of Notre Dame du Lac*, 69 Ind. 344; *State v. Parker*, 32 N. J. Law, 426; *President, etc., of Harvard College v. Board of Aldermen of City of Boston*, 104 Mass. 470; *Biscoe v. Coulter*, 18 Ark. 423; *City of Newport v. Covington & C. St. Ry. Co.*, 89 Ky. 29, 11 S. W. 954; *City of Baltimore v. State ex rel. Board of Police of City of Baltimore*, 15 Md. 376, 74 Am. Dec. 572.

An exemption from taxation is never presumed, but must be clearly granted, *Phoenix Fire & Marine Ins. Co. v. Tennessee, Use of Memphis*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660; and statutes exempting property from taxation must be strictly construed against those claiming the exemption, *People ex rel. Breymeyer v. Watseka Camp Meeting Ass'n*, 160 Ill. 576, 43 N. E. 716.

But public property is not subject to general taxation. *People ex rel. Mayor, etc., of New York, v. Board of Assessors*, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; *City of Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273; *Green v. Hotaling*, 44 N. J. Law, 347; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Erie County v. City of Erie*, 113 Pa. 360, 6 Atl. 136; *Willard v. Pike*, 59 Vt. 202, 9 Atl. 907; *City of Reading v. Berks County*, 22 Pa. Super. Ct. 373; *Warren County v. Nall*, 78 Miss. 726, 29 South. 755; *City of Somerville v. City of Waltham*, 170 Mass. 160, 48 N. E. 1092; *City of Newark v. Inhabitants of Verona*, 59 N. J. Law, 94, 34 Atl. 1060. But see *City of Rochester v. Coe*, 25 App. Div. 300, 49 N. Y. Supp. 502.

<sup>40</sup> *ADAMS v. DUCATE*, 86 Miss. 276, 38 South. 497, Cooley, Cas. Mun. Corp. 338.

must be equal. Exception has been made to this general doctrine in some cases with regard to agricultural lands,<sup>41</sup> for which a special rate has been provided; but in other cases this discrimination has been held to be unconstitutional.<sup>42</sup> There is, indeed, some conflict as to the right of the municipality to tax agricultural lands. It has been held in Iowa and in Kentucky that agricultural lands, though within the corporate limits, are not subject to taxation for municipal purposes, especially if from their location the benefits of police protection, lighting, etc., cannot be extended to them.<sup>43</sup> It was, however, conceded that if the benefits of police and fire protection, water service, and lighting could be and were enjoyed by the lands, they would be subject to taxation for municipal purposes.<sup>44</sup> The prevailing rule, however, has always been that agricultural lands within the corporate limits are taxable for municipal purposes, irrespective of the question of benefits.<sup>45</sup>

<sup>41</sup> *Allen v. City of Davenport*, 107 Iowa, 90, 77 N. W. 532; *Commonwealth v. Louisville & N. R. Co.* (Ky.) 46 S. W. 206; *Ryan v. Central City* (Ky.) 54 S. W. 2; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *Kelly v. City of Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 633; *State v. Brown*, 53 N. J. Law, 162, 20 Atl. 772; *Land, Log & Lumber Co. v. Brown*, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472; *Town of Dixon v. Mayes*, 72 Cal. 166, 13 Pac. 471; *McClay v. City of Lincoln*, 32 Neb. 412, 49 N. W. 282; *People ex rel. Bank for Savings in City of New York v. Miller*, 84 App. Div. 168, 82 N. Y. Supp. 621.

<sup>42</sup> *Town of Latonia v. Hopkins* (Ky.) 47 S. W. 248; *Sharp's Ex'r v. Dunavan*, 17 B. Mon. (Ky.) 223; *City of Davenport v. Kauffman*, 34 Iowa, 194. See *Briggs v. Town of Russellville*, 99 Ky. 515, 36 S. W. 558, 34 L. R. A. 193.

<sup>43</sup> *TAYLOR v. CITY OF WAVERLY*, 94 Iowa, 661, 63 N. W. 347, *Cooley, Cas. Mun. Corp.* 341; *Courtney v. City of Louisville*, 75 Ky. (12 Bush) 419.

<sup>44</sup> *PERKINS v. CITY OF BURLINGTON*, 77 Iowa, 553, 42 N. W. 441, *Cooley, Cas. Mun. Corp.* 340; *Briggs v. Town of Russellville*, 99 Ky. 515, 36 S. W. 558, 34 L. R. A. 193.

<sup>45</sup> *Kelly v. City of Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 633; *Davis v. Town of Point Pleasant*, 32 W. Va. 289, 9 S. E. 228; *State v. Brown*, 53 N. J. Law, 162, 20 Atl. 772; *Comstock v. Town of Waterford*, 85 Conn. 6, 81 Atl. 1059, 37 L. R. A. (N. S.) 1166; *Atherton v. Village of Essex Junction*, 83 Vt. 218, 74 Atl. 1118, 27 L. R. A. (N. S.) 695, *Ann. Cas.* 1912A, 339.

*Adjacent Lands*

The power of the state is recognized in apportioning taxation for local improvements to include in the taxation district with a municipality adjoining lands to be benefited by the improvement; and thus to create a special taxing district *quoad hoc*.<sup>46</sup> For the administration of this improvement the municipality is usually appointed the governmental agency, and empowered through its existing instrumentalities to assess, levy, and collect taxes for the improvement, not only upon lands within, but lands beyond its local boundaries.<sup>47</sup> The power of taxation in such cases is confined to the special levy for the improvement, and cannot include taxation for general municipal purposes.<sup>48</sup>

*Situs*

The law of actual situs prevails with regard to chattels.<sup>49</sup> They are taxable by the municipality if they are usually kept or belong within its limits; and this, it seems, is so regardless of the domicile of the owner.<sup>50</sup> But goods and chattels found

<sup>46</sup> Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; People v. Mayor, etc., of City of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

<sup>47</sup> In re House Bill No. 165, 15 Colo. 593, 26 Pac. 141.

<sup>48</sup> Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187; Wilkey v. City of Pekin, 19 Ill. 160; Pacific Sheet Metal Works v. Roeder, 26 Wash. 183, 66 Pac. 428; Wells v. City of Weston, 22 Mo. 384, 66 Am. Dec. 627.

<sup>49</sup> Diamond Match Co. v. Ontonagon, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394; Winston v. Salem, 131 N. C. 404, 42 S. E. 889; Ellis v. People, 199 Ill. 548, 65 N. E. 428; People ex rel. Orinoka Mills v. Barker, 84 App. Div. 469, 83 N. Y. Supp. 33. See 2 Dill. Mun. Corp. § 786.

Logs floating in a lake, so that at time of assessment they were in different townships, but were all intended to be taken to a certain sawmill, are assessable in the township where the mill is located. Mitchell v. Lake Tp., 126 Mich. 367, 85 N. W. 865.

<sup>50</sup> Mills v. Thornton, 26 Ill. 300, 79 Am. Dec. 377; People v. Commissioners of Taxes, 23 N. Y. 224; Carrier v. Gordon, 21 Ohio St. 605; City of Davenport v. Mississippi & M. R. Co., 12 Iowa, 539;

temporarily within a municipality are not taxable therein; as where a vessel is at a city wharf taking on freight, her situs is not there, but at the home port, or domicile of the owner.<sup>51</sup> The same principle will apply to railway cars and locomotives. They would be taxable at the company yard or roundhouse.<sup>52</sup> And so of other mobilia at the garage, dock, or stable where they are usually kept when not in use.<sup>53</sup>

*Notes, Bonds, and Choses in Action—Situs of*

Much contention has arisen over the situs of stocks and bonds, franchises, notes, and other choses in action. The general rule with regard to such classes of personality is that they are taxable at the owner's domicile, if he be a natural person.<sup>54</sup> But it has been held that where the owner, a nonresi-

**City Council of Augusta v. Dunbar**, 50 Ga. 387; **St. Louis v. Wiggins Ferry Co.**, 11 Wall. (U. S.) 423, 20 L. Ed. 192.

<sup>51</sup> **Johnson v. De Bary-Baya Merchants' Line**, 37 Fla. 499, 19 South. 640, 37 L. R. A. 518; **Mayor, etc., of City of Mobile v. Baldwin**, 57 Ala. 61, 29 Am. Rep. 712; **Morgan v. Parham**, 16 Wall. (U. S.) 471, 21 L. Ed. 303; **City of St. Joseph ex rel. Hannibal & St. J. R. Co. v. Saville**, 39 Mo. 460; **Perry v. Torrence**, 8 Ohio, 521, 32 Am. Dec. 725.

<sup>52</sup> **Chicago, B. & Q. R. Co. v. Hitchcock Co.**, 40 Neb. 781, 59 N. W. 358; **Philadelphia, W. & B. R. Co. v. Appeal Tax Court of Baltimore City**, 50 Md. 397; **Randall v. Elwell**, 52 N. Y. 521, 11 Am. Rep. 747; **Coe v. Columbus, P. & I. R. Co.**, 10 Ohio St. 372, 75 Am. Dec. 518; **Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.**, 2 Wall. (U. S.) 609, 17 L. Ed. 886.

The value of the rolling stock of a corporation is capital employed within the state, unless such stock is used exclusively outside the state. **People ex rel. New York Cent. & H. R. R. Co. v. Knight**, 173 N. Y. 255, 65 N. E. 1102; **Winton Coal Co. v. Commissioners (Pa. Com. Pl.) 1 Lack. Leg. N.** 195.

<sup>53</sup> **St. Louis v. Wiggins Ferry Co.**, 11 Wall. (U. S.) 423, 20 L. Ed. 192; **City of Sacramento v. California Stage Co.**, 12 Cal. 134.

<sup>54</sup> **Corry v. Baltimore**, 96 Md. 310, 53 Atl. 942, 103 Am. St. Rep. 364; **City of Marquette v. Michigan Iron & Land Co.**, 132 Mich. 130, 92 N. W. 934; **Mackay v. City and County of San Francisco**, 113 Cal. 392, 45 Pac. 696; **In re Fair's Estate**, 128 Cal. 607, 61 Pac. 184. A deposit in a bank is a debt due the depositor, and its situs for the purposes of taxation is in the state of the depositor's domicile. **Pyle v. Brenneman**, 122 Fed. 787, 60 C. C. A. 409; **Clason v. City of New Orleans**, 46 La. Ann. 1, 14 South. 306; **Pacific Coast Sav. Soc. v. City**

dent, habitually leaves such property on deposit in the hands of an agent for management, it is taxable at the agent's domicile;<sup>55</sup> and in case of corporations, whether domestic or for-

and County of San Francisco, 133 Cal. 14, 65 Pac. 16. In *People ex rel. New York Cent. & H. R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102, it was held that where a domestic railroad owns the stock of a domestic transportation company which employs its capital outside the state, such stock constitutes no part of the railroad company's capital stock. Where money belonging to an estate was deposited in the city where one of three executors resided, one of the others being a nonresident, it was subject to taxation in such city. *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698.

The capital stock of a corporation is subject to taxation only in the state of its domicile. *Foster-Cherry Commission Co. v. Caskey*, 66 Kan. 600, 72 Pac. 268. Capital invested by a nonresident of the state in a seat in the New York Stock Exchange is property taxable in the state. *In re Glendinning's Estate*, 171 N. Y. 684, 64 N. E. 1121; *People ex rel. Philip Carey Mfg. Co. v. Commissioners of Taxes & Assessments*, 39 Misc. Rep. 282, 79 N. Y. Supp. 485. See *People ex rel. Dives-Pelican Min. Co. v. Feitner*; 77 App. Div. 189, 78 N. Y. Supp. 1017. *Contra*, *Reat v. People*, 201 Ill. 469, 66 N. E. 242; *Lee v. Dawson*, 8 Ohio Cir. Ct. R. 365.

The sovereign power which gives the shares of corporations their being can also give them situs within its territory for the purposes of taxation. *State v. Travelers' Ins. Co.*, 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138; *Dykes v. Lockwood Mortgage Co.*, 2 Kan. App. 217, 43 Pac. 268. See *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490, 22 L. Ed. 189; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 300, 21 L. Ed. 179; *Sturges v. Carter*, 114 U. S. 521, 5 Sup. Ct. 1014, 29 L. Ed. 240; *City of Davenport v. Mississippi & M. R. Co.*, 12 Iowa, 539; *Collins v. Miller*, 43 Ga. 336; *Johnson v. Oregon City Council*, 3 Or. 13; *Hunter v. Board of Sup'rs of Page County*, 33 Iowa, 376, 11 Am. Rep. 132; *Corriwall v. Todd*, 38 Conn. 443; *Mead v. Inhabitants of Roxborough*, 11 Cush. (Mass.) 362; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558.

<sup>55</sup> *People ex rel. Durand-Ruel v. Wells*, 41 Misc. Rep. 144, 83 N. Y. Supp. 936; *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747; *Catlin v. Hull*, 21 Vt. 152; *People v. Trustees of Village of Ogdensburg*, 48 N. Y. 390; *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107; *State, on Petition of Taylor, v. St. Louis County Court*, 47 Mo. 594; *Tazewell County Sup'rs v. Davenport*, 40 Ill. 197; *South Nashville St. Ry. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

Money or property held by an ancillary administrator is subject to taxation in the state granting such administration, where taxes

eign, its local franchises are taxable where they are used;<sup>56</sup> and its notes and other choses in action at the place where they are usually kept.<sup>57</sup>

#### STATE MAY IMPOSE

144. The state, in the exercise of its sovereign power, may impose special taxes upon the municipality for governmental, but not for strictly municipal purposes.

In creating a municipal corporation and conferring upon it the taxing power, the state does not and cannot surrender its own inherent sovereignty over the people and property within the municipal boundaries. No municipal power can exist in perpetuity.<sup>58</sup> The Legislature exercising the sovereign function of legislation may not only repeal the charter, and thus destroy the municipal life, but, since the greater includes the

are not paid on it at the principal place of administration. Dorris v. Miller, 105 Iowa, 564, 75 N. W. 482.

<sup>56</sup> Postal Tel. Cable Co. v. Norfolk, 101 Va. 125, 43 S. E. 207; London & San Francisco Bank v. Block (C. C.) 117 Fed. 900; Rocheblave Market Co. v. New Orleans, 110 La. 529, 34 South. 665; City of Detroit v. Donovan, 127 Mich. 604, 86 N. W. 1032; Billinghurst v. Spink County, 5 S. D. 84, 58 N. W. 272; Manufacturers' Ins. Co. v. Loud, 99 Mass. 146, 96 Am. Dec. 715.

The state board of equalization in assessing railroad property should include the value of the franchises with the taxable property. State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716.

<sup>57</sup> People ex rel. Orinoka Mills v. Barker, 84 App. Div. 469, 83 N. Y. Supp. 33; Armour Packing Co. v. Augusta, 118 Ga. 552, 45 S. E. 424, 98 Am. St. Rep. 128; Orange & A. R. Co. v. City Council of Alexandria, 17 Grat. (Va.) 185; Ontario Bank v. Bunnell, 10 Wend. (N. Y.) 186; British Commercial Life Ins. Co. v. Commissioners of Taxes and Assessments in New York, 31 N. Y. 32. Contra, Home Ins. Co. v. Board of Assessors, 48 La. Ann. 451, 19 South. 280.

<sup>58</sup> Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; People v. Morris, 13 Wend. (N. Y.) 325; Newton v. Mahoning County Com'rs, 100 U. S. 548, 25 L. Ed. 710.

less, it may withdraw powers conferred in whole or in part, and may exercise such powers itself.<sup>69</sup> The inherent power of taxation possessed by a state may be exercised by the Legislature upon property within as well as without the municipal boundaries; and for any strictly governmental purpose it is conceded that the state may tax municipal property not only for general objects,<sup>70</sup> but by special assessment for local improvements.<sup>71</sup>

It is also generally recognized by the courts that for purely municipal purposes the municipality may not be taxed by the state without its consent,<sup>72</sup> though upon this subject the cases are somewhat discordant; but there is great variety of decision in the various cases determining what is a governmental and what is a municipal purpose. The two leading cases in the United States representing these discordant views are those commonly known as the Philadelphia City Hall Case<sup>73</sup> and the Detroit Park Case,<sup>74</sup> heretofore discussed. In the former of these it was ruled that the state might compel the city to pay for the erection of "an enormous pile which surpasses the town halls and cathedrals of the Middle Ages in extent, if not in grandeur";<sup>75</sup> and in the latter that the state could not compel the city to pay for the purchase and improvement of a city park.<sup>76</sup> Between these divergent views of legislative control over municipal corporations is found a variety of decisions in divers states as to the legislative power to impose

<sup>69</sup> Williamson v. New Jersey, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

<sup>70</sup> Ante, § 27.

<sup>71</sup> 2 Dill. Mun. Corp. § 752.

<sup>72</sup> 1 Dill. Mun. Corp. §§ 72, 73; Cooley, Const. Lim. (6th Ed.) 284, 285.

<sup>73</sup> Perkins v. Slack, 86 Pa. 283.

<sup>74</sup> People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202.

<sup>75</sup> 1 Hare, Const. Law, 630.

<sup>76</sup> People ex rel. Board of Park Com'rs of Detroit v. Common Council of Detroit, supra. Nor build a courthouse. Callam v. Saginaw, 50 Mich. 7, 14 N. W. 677.

taxes upon a municipality, which generally recognize the doctrine above-stated, but differ in its application to particular cases.<sup>67</sup>

### LIMITATION OF EXPRESS POWER

**145.** The municipality may exercise the power of taxation expressly conferred upon it only within constitutional limitations.

This doctrine is so self-evident as scarcely to need elucidation; but much contention has arisen over express charter powers of taxation granted by the Legislature, and exercised by a municipality in strict conformity therewith. In practical operation, however, it was sometimes found that this not only wrought injustice, but produced results violative of constitutional protection. In some of these the taxation would not be equal and uniform<sup>68</sup> as required by the organic law. In others it would not be for a public, but for a private, purpose.<sup>69</sup> Such results, being contrary to fundamental law, cannot be

<sup>67</sup> City of Baltimore v. Reitz, 50 Md. 574; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; In re Adams, 165 Mass. 497, 43 N. E. 682; Pumphrey v. Mayor, etc., of Baltimore, 47 Md. 145, 28 Am. Rep. 446; People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480; Jefferson County Com'r's v. People ex rel. Griggs, 5 Neb. 136; Jensen v. Board of Supervisors of Polk County, 47 Wis. 298, 2 N. W. 320.

<sup>68</sup> Oliver v. Washington Mills, 11 Allen (Mass.) 268; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Gatlin v. Town of Tarboro, 78 N. C. 119; State v. Traders' Bank, 41 La. Ann. 329, 6 South. 582; Daly v. Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; Marsh v. Board of Sup'r's of Clark County, 42 Wis. 502.

Uniform taxation requires that the tax must be uniform throughout the territory to which it is applicable. Day v. Roberts, 101 Va. 248, 43 S. E. 362; State ex rel. Bee Bldg. Co. v. Savage, 65 Neb. 714, 91 N. W. 716; W. C. Peacock & Co. v. Pratt, 121 Fed. 772, 58 C. C. A. 48; Adams v. Bank of Oxford, 78 Miss. 532, 29 South. 402; Phoenix Assur. Co. of London v. Fire Dept. of City of Montgomery, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

<sup>69</sup> McInerney v. Huelefeld, 116 Ky. 28, 75 S. W. 237, 25 Ky. Law Rep. 272; Burroughs, Tax'n, § 130.

permitted when the power is challenged. The Legislature itself can confer upon a municipality no greater measure of power than it possesses; and, since it can enact no valid law contrary to the constitutional provisions, it can confer upon the municipality no power to pass unconstitutional ordinances.<sup>70</sup>

### IMPLIED POWER

146. The municipality may levy taxes for the performance of any municipal duty imposed, or exercise of any municipal function conferred upon it by charter or by general law.

Of the three classes of municipal powers, express, inherent, and implied, it is obvious that a municipality for the purpose of taxation possesses the first within constitutional limitations, but may not exercise any under the second class. What implied power for taxation belongs to a municipal corporation is not so easy to determine. Here, however, as elsewhere, in the construction of municipal charters, the general doctrine is applied that the corporation has by implication such measure of power as is necessary to the proper execution of the charter powers expressly granted.<sup>71</sup> Thus, as we have seen, the

<sup>70</sup> Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Burr v. City of Atlanta, 64 Ga. 225; City of Marshalltown v. Blum, 58 Iowa, 184, 12 N. W. 266, 43 Am. Rep. 116; State v. North, 27 Mo. 464; Wiley v. Farmer, 14 Ala. 627; Hitchcock v. City of St. Louis, 49 Mo. 484; Weeks v. City of Milwaukee, 10 Wis. 242; Citizens' Savings & Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455.

<sup>71</sup> City of Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; Risley v. City of Utica (C. C.) 179 Fed. 875; City of Eufaula v. McNab, 67 Ala. 588, 42 Am. Rep. 118; Town of Danville v. Shelton, 76 Va. 325; City of Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336; City of Corvallis v. Carlile, 10 Or. 139, 45 Am. Rep. 134; Bennett v. City of Buffalo, 17 N. Y. 383; City of Fairfield v. Ratcliff, 20 Iowa, 396; Wright v. City of Chicago, 20 Ill. 252; Mayor, etc., of City of Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 161.

power to borrow money implies the power of taxation sufficient to repay the loan.<sup>72</sup> The power to grade and pave streets implies the power to collect sufficient revenue to pay the expenses of the improvement.<sup>73</sup> So, also, of the power to preserve public health,<sup>74</sup> to purchase fire engines and other apparatus,<sup>75</sup> to erect public buildings,<sup>76</sup> to purchase lands for public squares and parks,<sup>77</sup> and the like.<sup>78</sup> Having the general power of taxation, the municipality may exercise it to raise revenue necessary for any of these charter purposes. But it has been held that the taxing power cannot be implied from a general welfare clause in the charter,<sup>79</sup> nor from the power to enact by-laws for the good government of the town.<sup>80</sup> Nor will power to make by-laws to "promote the benefit and advantage of a corporation" authorize it to levy a tax to pay the expense of procuring the location of a railroad through the municipality.<sup>81</sup> So the power to regulate and improve streets does not include the power to make local assessments;<sup>82</sup> and the power to enact by-laws necessary for the

<sup>72</sup> *Ante*, § 127.

<sup>73</sup> *Mayor, etc., of City of Annapolis v. Harwood*, *supra*.

<sup>74</sup> *In re Taxpayers and Freeholders of Village of Plattsburgh*, 157 N. Y. 78, 51 N. E. 512.

<sup>75</sup> *Sibley v. Mobile*, 3 Woods, 535, Fed. Cas. No. 12,829; *Desmond v. City of Jefferson* (C. C.) 19 Fed. 483; *City of Birmingham v. Rumsey*, 63 Ala. 352.

<sup>76</sup> *Perkins v. Slack*, 86 Pa. 283; *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586; *Trustees of School Dist. No. 1 v. Jameson*, 15 S. W. 1, 779, 12 Ky. Law Rep. 719.

<sup>77</sup> *In re City of New York*, 99 N. Y. 569, 2 N. E. 642.

<sup>78</sup> *Oconto City Water Supply Co. v. City of Oconto*, 105 Wis. 76, 80 N. W. 1113; *Jonas v. City of Cincinnati*, 18 Ohio, 318; *State ex rel. Stewart v. Police Jury of Parish of Jefferson*, 34 La. Ann. 673; *United States ex rel. Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395.

<sup>79</sup> *Commissioners of Town of Asheville v. Means*, 29 N. C. 406; *Mays v. City of Cincinnati*, 1 Ohio St. 268.

<sup>80</sup> *Ex parte Burnett*, 30 Ala. 461; *Commissioners of Town of Asheville v. Means*, *supra*.

<sup>81</sup> *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468 (GIL. 424).

<sup>82</sup> *City of Fairfield v. Ratcliff*, 20 Iowa, 396.

security, welfare, and convenience of the city does not authorize a tax on liquor dealers.<sup>83</sup> And so rigidly has the doctrine of necessary implication been applied in some cases that it has been held that the power to remove obstructions and widen and deepen public waters does not authorize a local assessment for deepening the city harbor;<sup>84</sup> and even that the power to subscribe for the stock of a railroad does not include the power to levy a tax to pay for the stock.<sup>85</sup> But this last case appears to be sporadic.

### LICENSE TAX

#### 147. A license tax may be imposed by the municipality only when power is expressly conferred.

Municipal licenses may be divided into two classes: (1) Police, and (2) revenue. It has been repeatedly held that a municipality may license certain occupations and forbid the exercise of the same by unlicensed persons.<sup>86</sup> This is under the police power granted to the municipality; but in such case the fee to be charged against the licensee is determined by the necessary expense connected with the police regulation.<sup>87</sup> The taxing power, however, cannot be implied from the police power.<sup>88</sup> And so it has been repeatedly held that where the sum charged for a municipal license is obviously for purposes of taxation, and not merely a license fee, the charge is unauthorized and void, unless authority to levy a license tax has

<sup>83</sup> *Ex parte Burnett*, 30 Ala. 461.

<sup>84</sup> *Wright v. City of Chicago*, 20 Ill. 252.

<sup>85</sup> *Burnes v. Mayor, etc., of Atchison*, 2 Kan. 454.

<sup>86</sup> *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, 76 N. W. 1065; *City of Rochester v. Upman*, 19 Minn. 108 (Gil. 78); *Kitson v. Mayor, etc., of Ann Arbor*, 26 Mich. 326; 2 Dill. *Mun. Corp.* § 768.

<sup>87</sup> *McQuillin, Mun. Corp.* vol. 3, §§ 991-1002.

<sup>88</sup> *Mayor, etc., of Town of Columbia v. Beasley*, 1 Humph. (Tenn.) 232, 34 Am. Dec. 646; *Kip v. Mayor, etc., of City of Paterson*, 26 N. J. Law, 298.

been expressly conferred by charter or general legislation.<sup>89</sup> The tax on occupations is upon persons pursuing such occupations within the city, whether their residence be inside or outside the corporate limits.<sup>90</sup> And no discrimination can be made as between residents and nonresidents.<sup>91</sup> A person residing within a city cannot be taxed upon his occupation if it be pursued exclusively outside the municipality.<sup>92</sup>

### EXERCISE OF POWER

#### 148. Record evidence of the action of the governing body of the municipality is essential to the validity of a tax levy.

The power of taxation conferred upon a municipality must be exercised by the common council as the governing body of the corporation.<sup>93</sup> It cannot be delegated by the council to officers or other persons,<sup>94</sup> unless the power of delegation be expressly conferred by the Legislature, and such legislation has been held to be constitutional.<sup>95</sup> This exercise of the tax-

<sup>89</sup> Postal Tel. Cable Co. v. Norfolk, 101 Va. 125, 43 S. E. 207; City of Cape May v. Cape May Transp. Co., 64 N. J. Law, 80, 44 Atl. 948; Bull v. City of Quincy, 9 Ill. App. 127; Craig v. Burnett, 32 Ala. 728; Dunham v. Trustees of Rochester, 5 Cow. (N. Y.) 462; Mays v. City of Cincinnati, 1 Ohio St. 268; Benson v. Mayor, etc., of City of Hoboken, 33 N. J. Law, 280. As to where permission to charge a license fee has been conferred, see Wilson v. City of Lexington, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834; Morris v. Cummings, 91 Tex. 618, 45 S. W. 383; STATE ex rel. HOWE v. CITY OF DES MOINES, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157, Cooley, Cas. Mun. Corp. 325; City of Lake Charles v. Police Jury of Parish of Calcasieu, 50 La. Ann. 346, 23 South. 376.

<sup>90</sup> Worth v. Commissioners of Fayetteville, 60 N. C. 617.

<sup>91</sup> Mayor, etc., of City of Nashville v. Althrop, 5 Cold. (Tenn.) 555; State ex rel. Adger v. Mayor, etc., of City of Charleston, 2 Speers (S. C.) 719; Joyce v. Woods, 78 Ky. 386.

<sup>92</sup> McQuillin Mun. Corp. vol. 3, § 996.

<sup>93</sup> Davis v. Read, 65 N. Y. 566; Thomson v. Mayor, etc., of City of Booneville, 61 Mo. 282; City of Indianapolis v. Lawyer, 38 Ind. 348.

<sup>94</sup> Foss v. City of Chicago, 56 Ill. 354; Johnston v. Mayor, etc., of City of Macon, 62 Ga. 645.

<sup>95</sup> Schwartz v. Thirty-Two Flatboats, 14 La. Ann. 243.

ing power by the council applies alike to general and local assessments; but the Legislature may expressly confer upon other bodies or persons the power to make local assessments.<sup>96</sup> It is not an unwarranted exercise or delegation of the power of taxation for a city itself to appoint an engineer or committee to make a local assessment, and to make the levy by receiving and confirming the report.<sup>97</sup>

#### *Record Necessary*

But there can be no such thing as oral taxation.<sup>98</sup> The governing body in lawful session must enact the ordinance levying the tax, and must make a record of the same, and such levy can be proven only by the record.<sup>99</sup> In case of loss or destruction of the record it may be established in the manner provided by law.<sup>1</sup> The levy is invalid, and taxes cannot lawfully be collected thereunder, unless it is made by the body, and substantially in the manner directed by law.<sup>2</sup> A void levy cannot be validated by subsequent ratification.<sup>3</sup> But under proper legislative authority a valid reassessment may be made.<sup>4</sup>

<sup>96</sup> *Bower v. Bainbridge*, 116 Ga. 794, 43 S. E. 67; *Parker v. Mayor, etc., of City of New Brunswick*, 30 N. J. Law, 395; *Schenley v. Commonwealth, to Use of City of Allegheny*, 36 Pa. 29, 78 Am. Dec. 359.

<sup>97</sup> *West v. Whitaker*, 37 Iowa, 598.

<sup>98</sup> *Farrar v. Fessenden*, 39 N. H. 268.

<sup>99</sup> *Moser v. White*, 29 Mich. 59; *Godfrey v. Bennington Water Co.*, 75 Vt. 350, 55 Atl. 654; *City of New York v. Watts*, 40 Misc. Rep. 595, 83 N. Y. Supp. 23.

<sup>1</sup> *Williams v. Inhabitants of School Dist. No. 1, in Lunenburg*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

<sup>2</sup> *Burroughs, Tax'n*, § 148; *Allen v. City of Galveston*, 51 Tex. 302; *Lott v. Ross*, 38 Ala. 156; *Boice v. Inhabitants of City of Plainfield*, 38 N. J. Law, 95; *Green v. Ward*, 82 Va. 324; *City of Orlando v. Equitable Bldg. & Loan Ass'n*, 45 Fla. 507, 33 South. 986.

<sup>3</sup> *Hart v. Henderson*, 17 Mich. 218; *People v. Goldtree*, 44 Cal. 323; *Dean v. Borchsenius*, 30 Wis. 236.

But where a tax was void only because it exceeded the limit imposed by statute, the assessment could be validated by a subsequent act. *Kettelle v. Warwick & Coventry Water Co.*, 23 R. I. 114, 49 Atl. 492.

<sup>4</sup> *Tallman v. City of Janesville*, 17 Wis. 71; *City of New Orleans v.*

## ASSESSMENT AND COLLECTION

**149. Municipal taxes may be assessed and collected by state officers under general law, or by municipal officers thereunto authorized by the state, and appointed and directed by the municipality.**

Divers methods of assessing and collecting revenue prevail in the various states. Unless otherwise specially provided by law, the general methods of state taxation are to be pursued by municipalities.<sup>5</sup> Municipal taxes may be assessed and collected by state officers, or municipal officers appointed for this purpose may discharge this duty either as directed by statute or under municipal ordinances when authorized by law.

### *Tax Duplicates or Assessment Lists*

The municipality may use the tax duplicate or assessment list of the county or a special municipal assessment list may be made for the corporation according as the law may provide.<sup>6</sup> Under the latter method corrections may be made substantially in the same manner as in county assessments.<sup>7</sup>

### *Collections—Liens*

And as in case of assessments, so of collections, the duty may be performed under law either by county or municipal officers,<sup>8</sup> and collections may be enforced in substantially the

Poutz, 14 La. Ann. 853; *Fairfield v. People ex rel. McCrea*, 94 Ill. 244; *Doyle v. Mayor, etc., of City of Newark*, 34 N. J. Law, 236.

<sup>5</sup> *Burroughs, Tax'n*, § 140. Where a special method is prescribed by statute for the collection of taxes, it must be pursued to the exclusion of others based on general principles. *Board of Chosen Freeholders of Atlantic County v. Inhabitants of Weymouth Tp.*, 68 N. J. Law, 652, 54 Atl. 458.

<sup>6</sup> *State v. Godfrey*, 24 Ohio Cir. Ct. R. 455; *Deason v. Dixon*, 54 Miss. 585; *Garey v. City of Galveston*, 42 Tex. 627; *Nason v. Whitney*, 1 Pick. (Mass.) 140; *Wingate v. Ketner*, 8 Wash. 94, 35 Pac. 591.

<sup>7</sup> *Ante*, § 26.

<sup>8</sup> *Commonwealth v. Jimison*, 205 Pa. 367, 54 Atl. 1036; *Logan County v. Carnahan*, 66 Neb. 685, 92 N. W. 984, 95 N. W. 812; *City*

same method as that pointed out for quasi corporations.<sup>9</sup> A valid assessment constitutes a lien upon the property, which may be enforced by judicial proceeding.<sup>10</sup> An action at law also lies in favor of the corporation against the owner of the property for taxes thereon unpaid.<sup>11</sup>

#### *Tax a Debt*

In some states taxes due are regarded as a debt, and as such will lie in favor of a municipality against the person in whose name the assessment is made.<sup>12</sup> When specially authorized upon a municipal levy, a distress warrant may be issued thereon, which has the legal force of judgment and

of *Pensacola v. Sullivan*, 23 Fla. 1, 6 South. 922; *Webb v. Beaufort*, 88 N. C. 496; *City of Ft. Wayne v. Lehr*, 88 Ind. 62; *Hiestand v. City of New Orleans*, 14 La. Ann. 330.

A tax collector has no authority to sell property beyond the limits of his own county. *Morrison v. Casey*, 82 Miss. 522, 34 South. 145.

<sup>9</sup> Post, § 182.

<sup>10</sup> *Hertzler v. Cass County*, 12 N. D. 187, 96 N. W. 294; *Harris Franklin & Co. v. Layport*, 4 Neb. (Unof.) 636, 95 N. W. 851; *People v. Smith*, 123 Cal. 76, 55 Pac. 765; *Speich v. Tierney*, 56 Neb. 514, 76 N. W. 1090; *City of Easton v. Drake*, 9 Kulp (Pa.) 320; *In re Goodwin Gas Stove & Meter Co.'s Estate*, 3 Pa. Dist. R. 483.

Taxes are not liens on property on which they are assessed unless expressly made so by statute. *Skinner v. Christie*, 52 N. J. Eq. 720, 29 Atl. 772; *Burroughs, Tax'n*, §§ 109, 140. But see *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653.

<sup>11</sup> *Meredith v. United States*, 13 Pet. (U. S.) 486, 10 L. Ed. 258; *Contra, Montezuma Valley Water Co. v. Bell*, 20 Colo. 175, 36 Pac. 1102.

<sup>12</sup> *Ellis v. People*, 199 Ill. 548, 65 N. E. 428. But the suit should be brought in name of the state. *Chancellor of State of New Jersey v. City of Elizabeth*, 66 N. J. Law, 687, 52 Atl. 1130; *City of Dubuque v. Illinois Cent. R. Co.*, 39 Iowa, 56; *Rundell v. Lakey*, 40 N. Y. 517; *Town of Geneva v. Cole*, 61 Ill. 397; *City of Jonesboro v. Mayor, etc., of City of McKee*, 2 Yerg. (Tenn.) 167; *Winter v. City Council of Montgomery*, 79 Ala. 481; *Gordon v. Mayor, etc., of City of Baltimore*, 5 Gill (Md.) 281; *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378.

It was held in Missouri that a municipality cannot impose a tax lien upon property without express charter authority. *City of Springfield v. Starke*, 93 Mo. App. 70. See *Chamberlain v. Woolsey*, 66 Neb. 141, 92 N. W. 181, 95 N. W. 38.

But see *Brule County v. King*, 11 S. D. 294, 77 N. W. 107, where

execution at law.<sup>13</sup> If the charter is silent, common-law action, and not summary proceeding, is the proper method of enforcing collection.<sup>14</sup> These regulations applicable to general taxes are usually held not to apply in local assessments;<sup>15</sup> and there are many cases distinguishing debts and taxes,<sup>16</sup> and some holding that no common-law action will lie for taxes.<sup>17</sup> At present, in most of the states efficient methods for collecting municipal taxes, either summary or otherwise, are prescribed by legislation, and resort to common-law remedies is rarely necessary.

the only method of collecting personal taxes authorized by the statute is by distress and sale, and it was held that they are not recoverable by action, since they are not debts.

<sup>13</sup> Mayor, etc., of City of Baltimore v. Howard, 6 Har. & J. (Md.) 383; Noble v. Amoretti, 11 Wyo. 230, 71 Pac. 879; City of Easton v. Drake, 9 Kulp (Pa.) 320; Palmer v. Pettingill, 6 Idaho, 346, 55 Pac. 653.

<sup>14</sup> Corporation of City of Amite v. Clementz, 24 La. Ann. 27; City of Jefferson v. McCarty, 74 Mo. 55; City of Camden v. Allen, 26 N. J. Law, 398; City Council of Augusta v. Dunbar, 50 Ga. 387.

<sup>15</sup> Paine v. Spratley, 5 Kan. 525; Hale v. City of Kenosha, 29 Wis. 599; Emery v. San Francisco Gas Co., 28 Cal. 345; Worcester Agricultural Society v. Mayor, etc., of City of Worcester, 116 Mass. 189.

<sup>16</sup> Shaw v. Peckett, 26 Vt. 486; Lane County v. Oregon, 7 Wall. (U. S.) 71, 19 L. Ed. 101; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197.

<sup>17</sup> City of Camden v. Allen, 26 N. J. Law, 398; City of Augusta v. North, 57 Me. 392, 2 Am. Rep. 55; City of Detroit v. Jepp, 52 Mich. 458, 18 N. W. 217; City of Charleston v. Oliver, 16 S. C. 47.

When the statute provides a remedy for the collection of taxes under given circumstances, that remedy is exclusive of all others. Chamberlain v. Woolsey, 66 Neb. 141, 92 N. W. 181, 95 N. W. 38. And so, also, when a city charter gives a method for the assessment, levy, and collection of city taxes. City of Rochester v. Gleichauf, 40 Misc. Rep. 446, 82 N. Y. Supp. 750. But see City of Burlington v. Burlington & M. R. R. Co., 41 Iowa, 134; Mayor, etc., of City of Baltimore v. Howard, 6 Har. & J. (Md.) 383.

### TAXATION FOR CREDITORS

**150. The courts may compel the levy and collection of taxes by a municipality to satisfy municipal indebtedness.**

A municipal creditor having matured indebtedness against a municipality may pursue the usual methods to enforce collection by action at law, judgment, and execution;<sup>18</sup> but, since all municipal property used in the performance of governmental functions is exempt from execution,<sup>19</sup> such mode of collection usually proves inadequate, and the creditor finds the usual remedy at law greatly embarrassed, and oftentimes totally ineffective. Whenever this is made to appear, the courts will grant him the remedy of mandamus to enforce satisfaction by means of taxation.<sup>20</sup>

#### *Mandamus*

In the federal courts and some state courts a judgment is an essential prerequisite to this writ;<sup>21</sup> but in many of the state courts this is not the rule;<sup>22</sup> and in some the procedure admits of a judgment and mandamus in the same suit.<sup>23</sup>

<sup>18</sup> Holladay v. Frisbie, 15 Cal. 630; Brown v. Gates, 15 W. Va. 131; Hart v. City of New Orleans (C. C.) 12 Fed. 292.

<sup>19</sup> Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Foster v. Fowler, 60 Pa. 27; Darling v. Mayor, etc., of Baltimore, 51 Md. 1.

<sup>20</sup> City of Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; Klein v. New Orleans, 99 U. S. 149, 25 L. Ed. 430; Curry v. Mayor, etc., of City of Savannah, 64 Ga. 290, 37 Am. Rep. 74; Darlington v. Mayor, etc., of City of New York, 31 N. Y. 164, 88 Am. Dec. 249.

But one having a general judgment against a city is not entitled to mandamus to compel payment from funds derived from taxes levied for the payment of certain bonds. State ex rel. Hopper v. Cottengin, 172 Mo. 129, 72 S. W. 498.

<sup>21</sup> Bath County v. Amy, 13 Wall. (U. S.) 244, 20 L. Ed. 539; People ex rel. Lawrence v. Board of Sup'rs of Clark County, 50 Ill. 213; State ex rel. White v. Clay County, 46 Mo. 231; Coy v. City Council of Lyons City, 17 Iowa, 1, 85 Am. Dec. 539.

<sup>22</sup> State ex rel. Ross v. Anderson County, 8 Baxt. (Tenn.) 249; Louisville & N. R. Co. v. Davidson County Court, 1 Snead (Tenn.)

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<sup>23</sup> See note 23 on following page.

The court may not appoint officers or commissioners to levy and collect the taxes,<sup>24</sup> but enforces the collection by mandamus against the officers empowered to perform these functions.<sup>25</sup> If assessors or collectors fail or refuse to perform their duty in obedience to the order of the court, they may be punished for contempt.<sup>26</sup> The court may also by appropriate order compel the application of the fund collected to the satisfaction of the plaintiff's demand.<sup>27</sup>

637, 62 Am. Dec. 424; *Flagg v. Mayor, etc., of City of Palmyra*, 33 Mo. 440; *Justices of Clarke County Court v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon. (Ky.) 143; *Brown v. Crego*, 32 Iowa, 498; *State ex rel. Sherman v. Common Council of City of Milwaukee*, 20 Wis. 87.

<sup>23</sup> *City of Watertown v. Cady*, 20 Wis. 501; *Nelson v. Justices of Carter County*, 1 Cold. (Tenn.) 207.

<sup>24</sup> *Rees v. Watertown*, 19 Wall. (U. S.) 107, 22 L. Ed. 72; *Walkley v. Muscatine*, 6 Wall. (U. S.) 481, 18 L. Ed. 930.

<sup>25</sup> *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Bassett v. Barbin*, 11 La. Ann. 672; *State ex rel. Souter v. Common Council of City of Madison*, 15 Wis. 30.

<sup>26</sup> *Beachy v. Lamkin*, 1 Idaho, 50; *Ex parte Holman*, 28 Iowa, 88, 4 Am. Rep. 159.

<sup>27</sup> *Galena v. United States ex rel. Amy*, 5 Wall. (U. S.) 705, 18 L. Ed. 560; *Coy v. City Council of Lyons City*, 17 Iowa, 1, 85 Am. Dec. 539.

## CHAPTER XV.

### ACTIONS

- 151. A Municipality may Sue and be Sued.
- 152. Plaintiff in Actions Ex Contractu.
- 153. Defendant in Actions Ex Contractu.
- 154. Plaintiff in Actions Ex Delicto.
- 155. Defendant in Actions Ex Delicto.
- 156. Mandamus.
- 157. Quo Warranto.
- 158. Certiorari.
- 159. Complainant in Chancery.
- 160. Defendant in Chancery.
- 161. Injunctions.
- 162. Criminal Prosecution.

### A MUNICIPALITY MAY SUE AND BE SUED

- 151. Capacity to sue and be sued in its corporate name is an essential attribute of the municipal corporation.

"Certain powers are incidental to corporate existence, and are impliedly conferred upon every corporation unless there is something in the charter to show an intention to exclude them."<sup>1</sup> Such powers are variously termed "incidental," "essential," "indispensable," or "inherent."<sup>2</sup> Among these essential incidents are a corporate name and seal, the power to make by-laws, to purchase, hold, and alienate property, to have perpetual succession, and to sue and be sued by the corporate name.<sup>3</sup> Whatever doubts may exist as to the capacity

<sup>1</sup> Clark, Priv. Corp. § 51.

<sup>2</sup> 1 Dill. Mun. Corp. § 89; Marsh. Corp. § 57; Arn. Mun. Corp. c. 3; Clark, Priv. Corp. § 49.

<sup>3</sup> A municipal corporation may sue and be sued in its proper corporate name. Powers v. Mayor, etc., of Town of Decatur, 54 Ala. 214; City of Boston v. Schaffer, 9 Pick. (Mass.) 415.

A city has inherent power to sue, and therefore need never allege that power. City of Janesville v. Milwaukee & M. R. Co., 7 Wis. 484. Where an action is brought by a city, in its corporate name, by

of quasi corporations to sue and be sued,<sup>4</sup> none pertain to municipal corporations. Being chartered and empowered to exist and act as corporations, they are distinct legal entities, and as such are protected by and amenable to the law. A municipality, therefore, like any other complete corporation or person, may appeal to the courts for vindication of its rights, and for wrong done by it may be sued by the injured party.<sup>5</sup>

### PLAINTIFF IN ACTIONS EX CONTRACTU

**152. To redress a wrong arising out of breach of contract, the municipality may bring and maintain the proper common-law action, or any statutory substitute therefor.**

A municipality may make contracts with other corporations, public or private, and with natural persons, from the breach of which by them the municipality may suffer loss or damage. For redress of such an injury the courts are open to a municipal corporation just as to a private corporation or a natural person.<sup>6</sup> The same form of redress is alike open to all for identical injuries. If the contract broken by the other party had been executed under seal, the action of covenant lies to recover damages for the breach.<sup>7</sup> If it was an express

its proper law officers, it will be presumed that the action is authorized, until the contrary appears. *Lincoln St. Ry. Co. v. City of Lincoln*, 61 Neb. 109, 84 N. W. 802. See *Clark, Priv. Corp.* § 51.

<sup>4</sup> *Ante*, §§ 6, 7.

<sup>5</sup> *Burrill v. Boston*, 2 Cliff. 590, Fed. Cas. No. 2,198; *Mayor, etc., of City of Jonesboro v. McKee*, 2 Yerg. (Tenn.) 167.

<sup>6</sup> *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Oliver v. City of Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *City of Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *City of Buffalo v. Bettinger*, 76 N. Y. 393.

<sup>7</sup> *Board of Sup'rs of St. Joseph County v. Coffenbury*, 1 Mich. 355; *Turner v. Clark County*, 67 Mo. 243; *Sweetser v. Hay*, 2 Gray (Mass.) 49.

contract for the payment of a specified sum of money, debt will be the proper form of action.<sup>8</sup> This form of action has been used to recover a fixed penalty for breach of municipal ordinance.<sup>9</sup> The municipality may sue in assumpsit to recover for breach of an implied contract;<sup>10</sup> or for any matters of the common counts;<sup>11</sup> and also for the penalty of an ordinance whether fixed or discretionary.<sup>12</sup> In states where the common-law forms of action have been abolished, the municipality may avail itself of the proceeding provided in the Code as the equivalents of those above mentioned to redress wrongs arising from breach of contract.<sup>13</sup> Such actions are subject to the general rules of procedure, applying alike to all plaintiffs, natural and corporate.<sup>14</sup>

#### DEFENDANT IN ACTIONS EX CONTRACTU

153. The municipality, like any other corporation, is liable to be sued in assumpsit, debt, or covenant, or any equivalent statutory action for breach of contract by it.

As we have heretofore seen, a municipal corporation, within the scope of its charter powers, may contract obligations to

<sup>8</sup> 1 Chitty, Pl. (14th Am. Ed.) 108.

<sup>9</sup> Staats v. Inhabitants of Borough of Washington, 45 N. J. Law, 318; Barter v. Commonwealth, 3 Pen. & W. (Pa.) 253; 1 Dill. Mun. Corp. § 409.

<sup>10</sup> (Unpaid taxes) Dugan v. Mayor, etc., of City of Baltimore, 1 Gill. & J. (Md.) 499; Mayor, etc., of City of Jonesboro v. McKee, 2 Yerg. (Tenn.) 167; Town of Geneva v. Cole, 61 Ill. 397.

<sup>11</sup> 1 Chitty Pl. (14th Am. Ed.) 341.

<sup>12</sup> Ewbanks v. President, etc., of Town of Ashley, 36 Ill. 178; Greeley v. City of Passaic, 42 N. J. Law, 429.

<sup>13</sup> Deitz v. City of Central, 1 Colo. 323; Town of Brookville v. Gaggle, 73 Ind. 117; Coates v. Mayor, etc., of City of New York, 7 Cow. (N. Y.) 585.

<sup>14</sup> Fitch v. Pinckard, 5 Ill. (4 Scam.) 78; City Council v. Dunn, 1

others, which it may not violate with impunity. The possession by the municipality of the sovereign powers of police, taxation, and eminent domain does not give it immunity from legal obligation, nor exempt it from the process of law.<sup>15</sup> Being capable to contract within the scope of its powers, it assumes thereby legal obligation, for the breach of which an action will lie against it just as against other corporations or persons.<sup>16</sup> If the contract broken was executed by the corporation with due formality under its corporate seal, covenant will lie against it.<sup>17</sup> Indeed, in England this is the only proper form of action on an executory contract, which lies against a municipality, since informal corporate contracts are not there recognized.<sup>18</sup> But in America, as we have heretofore seen, corporations may be bound by contracts informally executed by its officers, either in writing or orally.<sup>19</sup> For breach of such contracts the proper action would be debt or assumpsit, according to the rules distinguishing these two kinds of action.<sup>20</sup> In the Code states the action would be brought in

McCord (S. C.) 333; Napman v. People, 19 Mich. 352; Keeler v. Millidge, 24 N. J. Law, 142.

<sup>15</sup> 1 Dill. Mun. Corp. § 9.

<sup>16</sup> Burnett v. Abbott, 51 Ind. 254; City of New Orleans v. Guillotte's Heirs, 12 La. Ann. 818; Douglass v. Mayor, etc., of Virginia City, 5 Nev. 147.

<sup>17</sup> Morrell v. Sylvester, 1 Greenl. (Me.) 248; People v. Benfield, 80 Mich. 265, 45 N. W. 135; Inhabitants of Town of Montville v. Haughton, 7 Conn. 543; City of Platteville v. Hooper, 63 Wis. 385, 23 N. W. 583; Mayor, etc., of City of New York v. Crawford, 111 N. Y. 638, 19 N. E. 501.

<sup>18</sup> Arn. Mun. Corp. p. 29.

<sup>19</sup> Ante, § 73.

<sup>20</sup> Argenti v. City of San Francisco, 16 Cal. 255; Marble Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71; Louisiana City v. Wood, 102 U. S. 294, 26 L. Ed. 153; Mayor, etc., of City of Nashville v. Toney, 10 Lea (Tenn.) 643; Peterson v. Mayor, etc., of City of New York, 17 N. Y. 449; Tucker v. Mayor, etc., of Virginia City, 4 Nev. 20.

So, also, for a void tax paid under compulsion or protest. City of Grand Rapids v. Blakely, 40 Mich. 367, 29 Am. Rep. 539; Lincoln v. City of Worcester, 8 Cush. (Mass.) 55; Briggs v. Inhabitants of Lewiston, 29 Me. 472; Thomas v. City of Burlington, 69 Iowa, 140,

the manner provided for redressing injuries arising ex contractu.<sup>21</sup> Appearance to actions may be entered only by attorney, since corporations cannot appear in person.<sup>22</sup>

### *Execution*

Actions may be prosecuted to judgment against the municipality as against any other corporation or person; but in most states the mode of executing the judgment is not identical. In some states the judgment is allowed to be executed by the ordinary writ of fieri facias issued against the property of the municipality.<sup>23</sup> It may then be levied upon such goods and chattels, lands and tenements, owned by the municipality as are not indispensable to the public convenience and safety.<sup>24</sup> But the doctrine prevailing in America is that municipal property is not subject to levy on either attachment or execution.<sup>25</sup> The substitute for fieri facias in such cases is mandamus against the municipality and its officers commanding the sat-

28 N. W. 480; *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; *Westlake & Button v. City of St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *Corporation of City of Marshall v. Snediker*, 25 Tex. 460, 78 Am. Dec. 534; *Smith v. Farrelly*, 52 Cal. 77; *Stephan v. Daniels*, 27 Ohio St. 527.

<sup>21</sup> *Ante*, § 152, note 13.

<sup>22</sup> *Arn. Mun. Corp.* p. 28; *Coke, Lit. c.* 28, 66; *Case of Sutton's Hospital*, 10 *Coke*, 30. But see *Sharp v. Mayor, etc., of City of New York*, 31 *Barb. (N. Y.)* 572.

<sup>23</sup> *City of Independence v. Trouvalle*, 15 Kan. 70; *Gabler v. Treasurer of City of Elizabeth*, 42 N. J. Law, 79; *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Mayor, etc., of Birmingham v. Rumsey*, 63 Ala. 352.

<sup>24</sup> *Brown v. Gates*, 15 W. Va. 131; *City of New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 61; *Same v. Morris*, 105 U. S. 600, 26 L. Ed. 1184; *Freem. Ex'n's*, §§ 22, 126.

<sup>25</sup> No execution can issue against a municipal corporation. *Village of Sheridan v. Hibbard*, 19 Ill. App. 421; *Id.*, 119 Ill. 307, 9 N. E. 901; *City of Cairo v. Allen*, 3 Ill. App. 398; *City of Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Monaghan v. City of Philadelphia*, 28 Pa. 207; *City of McGregor v. Cook (Tex.)* 16 S. W. 936; *Emeric v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742; *Townsend v. Greeley*, 5 Wall. (U. S.) 326, 18 L. Ed. 547; *Crane v. City of Fond du Lac*, 16 Wis. 196; *Curry v. Mayor, etc., of City of Savannah*, 64 Ga. 290, 37 Am. Rep. 74.

isfaction of the debt out of the municipal treasury,<sup>26</sup> and, if necessary, a tax levy to raise the funds required therefor.<sup>27</sup>

### PLAINTIFF IN ACTIONS EX DELICTO

**154.** If a municipality suffers an injury to any corporate right or property from the tortious act or conduct of another corporation or person, it may have redress therefor by the proper common-law action, or its modern statutory substitute.

A municipal corporation may suffer injury in its property from the wrongful acts or omissions of other persons or corporations. Some of these may be redressed, as shown hereinbefore,<sup>28</sup> by action for penalty for breach of municipal ordinance; others may not be provided for in the municipal code. But whether the wrong done is or is not within the prohibition of the municipal ordinance, the courts are open to the municipality for the vindication of its rights and the redress of its wrongs according to the course of the common law; and, like any other person or corporation suffering an injury from tortious conduct of another, the municipality may bring suit and recover damages to compensate its loss.<sup>29</sup>

<sup>26</sup> Gooch v. Gregory, 65 N. C. 142; City of Bloomington v. Brokaw, 77 Ill. 194; Charnock v. District Tp. of Colfax, 51 Iowa, 70, 50 N. W. 286, 33 Am. Rep. 116; Klein v. New Orleans, 99 U. S. 149, 25 L. Ed. 430; Amy v. City of Galena (C. C.) 10 Biss. 263, 7 Fed. 163; Monaghan v. City of Philadelphia, 28 Pa. 207; United States v. New Orleans (C. C.) 17 Fed. 483.

<sup>27</sup> Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. Ed. 490; Coy v. City Council of Lyons City, 17 Iowa, 1, 85 Am. Dec. 539.

<sup>28</sup> Ante, § 52.

<sup>29</sup> Whitfield v. Longest, 28 N. C. 268; City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Union Coal Co. v. City of La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326; Board of Selectmen of Jersey City v. Dummer, 20 N. J. Law, 86, 40 Am. Dec. 213; Town of Castleton v. Langdon, 19 Vt. 210; City of Winona v. Huff, 11 Minn. 119 (Gil. 75); Commissioners of Town of Bath v. Boyd, 23 N. C. 196; Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797.

**DEFENDANT IN ACTIONS EX DELICTO**

155. For any tort committed or permitted by a municipal corporation, an action lies against it to any one sustaining loss or damage therefrom in person or property.

How a municipal corporation may be guilty of tort has been set forth at length in a previous chapter.<sup>30</sup> Whenever, under the rules there stated, a municipality commits or permits a tort, the person sustaining damage therefrom may redress his wrong by the appropriate common-law action, which may be case, trespass, detinue, trover, or replevin, according to the nature of the wrong done.<sup>31</sup> Ejectment also, and entry and detainer, may be brought upon proper facts against the municipality as well as by it.<sup>32</sup>

*Qui Tam Actions*

It has also been held that a municipality, as well as a natural person, is liable to a qui tam action provided by statute, to be brought by any private person to recover a penalty imposed for nonfeasance or misfeasance in the matter of a statutory duty.<sup>33</sup>

<sup>30</sup> Chapter 12.

<sup>31</sup> Moulton v. Inhabitants of Scarborough, 71 Me. 267, 36 Am. Rep. 308; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; Oliver v. City of Worcester, 102 Mass. 489, 3 Am. Rep. 485; Town of Suffolk v. Parker, 79 Va. 660, 52 Am. Rep. 640; Inhabitants of First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148; School Dist. No. 5 in Sanford v. Lord, 44 Me. 374; City of Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; Chadbourne v. Town of Newcastle, 48 N. H. 196; Williams v. City of New Orleans, 23 La. Ann. 507; Albrittin v. Mayor, etc., of City of Huntsville, 60 Ala. 486, 31 Am. Rep. 46.

<sup>32</sup> Sower v. City of Philadelphia, 35 Pa. 231; City of Boston v. Robbins, 126 Mass. 384; Armstrong v. City of St. Louis, 69 Mo. 309, 33 Am. Rep. 499.

<sup>33</sup> Bronson v. Town of Washington, 57 Conn. 346, 18 Atl. 264.

*Not Liable—When*

But the municipal corporation is not liable to an action ex delicto unless it has committed or permitted a tort. This self-evident proposition needs attention as a warning against deceptive appearances. Private injuries are often sustained from the act or neglect of municipal officers, contractors, or employés, for which no action lies against the municipality. Such cases are embraced in three classes: (1) Governmental acts; (2) acts ultra vires; (3) unauthorized acts. A wrongful act done by any one without authority from the municipality is not the act of the corporation.<sup>34</sup> A wrongful act by the governing body of a municipality, or any officer or contractor, which is wholly outside the charter powers of the corporation, resulting in private injury, is not the tort of the municipality, but of the persons committing it.<sup>35</sup> The act of the municipality, as the agency of the state for the performance of governmental functions, is not, in law, the act of the corporation, but of the state;<sup>36</sup> and therefore, unless the sovereign condescends to be sued, no action will lie either against it or its agent.<sup>37</sup> In fine, two elements are indispensable to

<sup>34</sup> Ante, § 123; *Everson v. City of Syracuse*, 100 N. Y. 577, 3 N. E. 784; *City of Corsicana v. White*, 57 Tex. 382; *Black v. City of Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Perley v. Inhabitants of Georgetown*, 7 Gray (Mass.) 464; *Barney v. City of Lowell*, 98 Mass. 571; *Dooley v. Town of Sullivan*, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; *Bryant v. City of St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Board of Com'rs of Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298.

<sup>35</sup> Ante, § 124; *City of Albany v. Cunliff*, 2 N. Y. 165; *Morrison v. City of Lawrence*, 98 Mass. 219; *Campbell's Adm'x v. City Council of Montgomery*, 53 Ala. 527, 25 Am. Rep. 656; *Conelly v. City of Nashville*, 100 Tenn. 262, 46 S. W. 565.

<sup>36</sup> *Russell v. City of Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; *City of Richmond v. Long's Adm'rs*, 17 Grat. (Va.) 375, 94 Am. Dec. 461; *Ham v. Mayor, etc., of City of New York*, 70 N. Y. 459; *Snider v. City of St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; *Wheeler v. City of Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Mead v. City of New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297; *Irvine v. City of Chattanooga*, 101 Tenn. 291, 47 S. W. 419.

<sup>37</sup> *Hayes v. City of Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Max-*

such actions: (1) The wrong must be at the hands of the corporation; (2) it must be a tort—i. e., an actionable injury.

### MANDAMUS

**156.** The writ of mandamus is granted by the courts against a municipality and its officers for refusing or culpably neglecting to perform any corporate or official duty, ministerial in kind, the injury resulting from which may not be adequately redressed by any other legal remedy.

Incidentally it has hitherto appeared that the writ of mandamus is used against a municipality as a substitute for the writ of fieri facias;<sup>88</sup> but this is not the only, nor, indeed, the most frequent, occasion for the use of this extraordinary process against a municipality. It is no longer generally considered in America a prerogative writ, but is a common method of redressing private as well as public injuries suffered from the misconduct of state or municipal officers in neglecting or refusing to perform plain ministerial duties.<sup>89</sup>

It has been employed in the United States not only to com-

milian v. Mayor, etc., of City of New York, 62 N. Y. 160, 20 Am. Rep. 488; Welsh v. Village of Rutland, 56 Vt. 228, 48 Am. Rep. 762; Dargan v. Mayor, etc., of City of Mobile, 31 Ala. 469, 70 Am. Dec. 505; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Elliott v. City of Philadelphia, 75 Pa. 347, 15 Am. Rep. 591.

<sup>88</sup> Ante, § 153 (execution).

<sup>89</sup> United States ex rel. West v. Hitchcock, 19 App. D. C. (U. S.) 333; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717; Traynor v. Beckham, 74 S. W. 1105, 25 Ky. Law Rep. 283; Id., 76 S. W. 844, 25 Ky. Law Rep. 981.

Mandamus will lie to compel the performance of purely municipal duties incumbent on an officer by virtue of his office, and concerning which he has no discretionary powers. Warmolts v. Keegan, 69 N. J. Law, 186, 54 Atl. 813; Brooklyn Teachers' Ass'n v. Board of Education of City of New York, 85 App. Div. 47, 83 N. Y. Supp. 1.

Where the duty of the officer involves discretion or judgment, a writ of mandamus will issue to compel him to act and decide, but not to direct in what way or in whose favor he shall decide. Kim-

pel the induction of a commissioned officer into his office,<sup>40</sup> and to compel the performance of a municipal duty,<sup>41</sup> but also against the corporation and its delinquent officer to compel them to correct an erroneous assessment for taxation;<sup>42</sup> to audit a municipal claim;<sup>43</sup> to issue a municipal warrant to pay the same;<sup>44</sup> to satisfy a judgment;<sup>45</sup> to pay for property

*berlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 44 C. C. A. 109; *Elliott v. City of Detroit*, 121 Mich. 611, 84 N. W. 820. See *Rex v. Stepney*, 71 Law J. K. B. 238, [1902] 1 K. B. 317. But see *Town of Cicero v. People*, 105 Ill. App. 406.

<sup>40</sup> *State ex rel. Atherton v. Sherwood*, 15 Minn. 221 (Gil. 172), 2 Am. Rep. 116; *State v. Smith* (Mo.) 15 S. W. 614; *Williams v. Common Council of City of Rahway*, 33 N. J. Law, 111.

<sup>41</sup> *People ex rel. Burke v. Mayor, etc., of Bloomington*, 63 Ill. 207; *Webster v. City of Chicago*, 83 Ill. 458.

<sup>42</sup> *People ex rel. Lawyer v. Board of Sup'rs of Schoharie County*, 39 Misc. Rep. 162, 79 N. Y. Supp. 145; *People ex rel. Lucey v. Mollooy*, 161 N. Y. 621, 55 N. E. 1099; *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064.

<sup>43</sup> *People ex rel. Smart v. Board of Sup'rs*, 66 App. Div. 66, 72 N. Y. Supp. 568; *People ex rel. Goodwin v. Coler*, 48 App. Div. 492, 62 N. Y. Supp. 964.

Where a board of county commissioners disallowed a claim for services rendered the county on the advice of the county attorney that the claim was illegal, and the board had no power to audit or allow any of its items, mandamus would lie to compel the board to audit the claim on its merits if there was any item in the claim which the board had power to allow. *Chipman v. Wayne County Auditors*, 127 Mich. 490, 86 N. W. 1024. Mandamus will lie to compel commissioners to act on a claim when they have refused to act, but not to direct their action. *Robey v. County Com'rs of Prince George's County*, 92 Md. 150, 48 Atl. 48. See *People ex rel. Rhodes v. Mole*, 85 App. Div. 33, 82 N. Y. Supp. 747.

<sup>44</sup> The owner of a city warrant may by mandamus compel its payment, where it is legally issued by the city, and there are sufficient funds in the treasury. *Wyker v. Francis*, 120 Ala. 509, 24 South. 895; *Wright v. Kinney*, 123 N. C. 618, 31 S. E. 874.

But the Supreme Court, in its discretion, may revise a mandamus on a city officer to sign a warrant to pay a claim when it appears that the relator should establish his right in a proceeding in which the city might present a defense. *Padavano v. Fagan*, 66 N. J. Law, 167, 48 Atl. 998.

<sup>45</sup> *City of Helena v. United States*, 104 Fed. 113, 43 C. C. A. 429; *Marion County v. Coler*, 75 Fed. 352, 21 C. C. A. 392.

Mandamus will lie to compel a city to make an authorized tax

taken by eminent domain; <sup>46</sup> to pay a specific sum of money according to a particular promise to satisfy bonds or matured coupons; <sup>47</sup> to issue bonds to pay for a public improvement completed or in progress; <sup>48</sup> to include certain items in a budget; <sup>49</sup> to deliver office and records thereof to an officer; <sup>50</sup> to apportion revenues and appropriate particular funds as required by law; <sup>51</sup> to observe and enforce civil serv-

levy to pay a debt against it. *City of Sherman v. Langham* (Tex.) 40 S. W. 140, 39 L. R. A. 258; *STEVENS v. MILLER*, 3 Kan. App. 192, 43 Pac. 439, *Cooley*, Cas. Mun. Corp. 344.

But where a city has already levied a tax to the limit allowed by law, the proceeds of which have been used for necessary city expenses, it will not be compelled to levy an additional tax to pay outstanding city warrants. *Portland Sav. Bank v. City of Montesano*, 14 Wash. 570, 45 Pac. 158; *City of Sherman v. Smith*, 12 Tex. Civ. App. 580, 35 S. W. 294.

<sup>46</sup> *Rudisill v. State ex rel. Bird*, 40 Ind. 485; *Dodge v. Essex County Com'r's*, 3 Metc. (Mass.) 380.

<sup>47</sup> *Fleming v. Dyer* (Ky.) 47 S. W. 444.

<sup>48</sup> *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Miller v. Bridgewater Tp. Committee*, 24 N. J. Law, 54; *Higgins v. City of Chicago*, 18 Ill. 276.

If the common council of a city neglect to proceed to open a street after the award of damages to the owners on the lands taken for the street has been made and confirmed by lapse of time in which to make an appeal, mandamus will lie to compel them to proceed. *People v. Common Council of Syracuse*, 20 How. Prac. (N. Y.) 491.

<sup>49</sup> *Barrett v. City of New Orleans*, 33 La. Ann. 542.

A writ of mandamus will not be granted to compel the mayor of a city to include in the annual budget an appropriation to pay relator's judgment against the city, when the budget has already been made, and the taxes levied before the time the writ could issue. *State ex rel. Foy v. City of New Orleans*, 49 La. Ann. 946, 22 South. 370.

<sup>50</sup> *Stevens v. Carter*, 27 Or. 553, 40 Pac. 1074, 31 L. R. A. 342; *People ex rel. Brewster v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769.

But when an office is filled by an actual incumbent exercising its functions de facto and under color of right, mandamus will not lie to compel him to turn over the books of the office to another, the question of title to the office being involved; quo warranto being the proper remedy. *Ashwell v. Bullock*, 122 Mich. 620, 81 N. W. 577; *Pipper v. Carpenter*, 122 Mich. 688, 81 N. W. 962.

<sup>51</sup> *Ingerman v. State ex rel. Conroy*, 128 Ind. 225, 27 N. E. 499; *City of New Orleans v. United States*, 49 Fed. 40, 1 C. C. A. 148; *Hunter v. Mobley*, 26 S. C. 192, 1 S. E. 670; *State ex rel. School Dist. No. 11 v. White*, 29 Neb. 288, 45 N. W. 631.

ice regulations; <sup>52</sup> and generally to do and perform any corporate or official duty ministerial in its nature, plainly required by law, and for which no other adequate legal remedy is provided.<sup>53</sup>

### *Refused When*

Mandamus is not granted to compel the performance of any legislative or judicial function,<sup>54</sup> or the discharge of any discretionary duty.<sup>55</sup> The tremendous power of this extraordinary writ is only to be invoked and exercised by the courts when there is a concurrence of three essential conditions: (1) The municipal duty must be plain and ministerial;<sup>56</sup> (2) the right of the relator must be clear and controlling;<sup>57</sup> (3) there

<sup>52</sup> People ex rel. Boyd v. Hertle, 46 App. Div. 505, 60 N. Y. Supp. 23.

<sup>53</sup> Territory ex rel. Crosby v. Crum, 13 Okl. 9, 73 Pac. 297; State ex rel. Higdon v. Jelks, 138 Ala. 115, 35 South. 60.

<sup>54</sup> State ex rel. New Orleans & C. R. Light & Power Co. v. St. Paul, 110 La. 722, 34 South. 750. A court of equity has no power to compel a city to erect a sewer. Horton v. Mayor, etc., of City of Nashville, 72 Tenn. (4 Lea) 39, 40 Am. Rep. 1; McCoy v. State, 2 Marv. (Del.) 543, 36 Atl. 81; Patterson v. Taylor, 98 Ga. 646, 25 S. E. 771; Illinois State Board of Health v. People, 102 Ill. App. 614. Mandamus will not lie unless there is a palpable abuse of discretion. People ex rel. Traders' Ins. Co. of New York v. Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; Commonwealth v. Park, 10 Phila. (Pa.) 445; People ex rel. Clapp v. Listman, 84 App. Div. 633, 82 N. Y. Supp. 784.

<sup>55</sup> The Supreme Court will not attempt by mandamus to control the discretionary powers of the district court. State ex rel. Thompson v. District Court for Johnson County, 2 Neb. (Unof.) 385, 96 N. W. 121; United States ex rel. Holzendorf v. Hay, 20 App. D. C. 576.

But where a public officer is guilty of so gross an abuse of discretionary power or evasion of duty as to amount to a refusal to perform the act enjoined, or to act at all in contemplation of law, mandamus will afford a remedy. People ex rel. Green v. Board of Com'rs of Cook County, 176 Ill. 576, 52 N. E. 334.

<sup>56</sup> State ex rel. Higdon v. Jelks, *supra*; Traynor v. Beckham, 25 Ky. Law Rep. 283, 74 S. W. 1105.

When the duties of a public officer are merely ministerial, mandamus is the proper remedy to compel a performance. People ex rel. Traders' Ins. Co. of New York v. Van Cleave, *supra*; Orman v. People (Colo.) 71 Pac. 430.

<sup>57</sup> Phoenix Iron Co. v. Commonwealth, 113 Pa. 563, 6 Atl. 75; State

must be lack of any other adequate legal remedy.<sup>58</sup> Moreover, it is to be noted that while the writ may be issued upon the relation of a private person for the enforcement of his personal rights, when the interest of the public is to be subserved, or the right of the state to be enforced, the judicial machinery can be set in motion by the Attorney General only.<sup>59</sup> Under these well-recognized and wholesome regulations the courts have refused mandamus to compel the issuance of a discretionary license by a mayor;<sup>60</sup> the approval of an official bond;<sup>61</sup> the enforcement of a private contract;<sup>62</sup> the levy of a tax to satisfy a collusive judgment upon ultra vires bonds;<sup>63</sup> the raising of revenue for an unauthorized purpose;<sup>64</sup> the

ex rel. Lighfoot v. McCabe, 74 Wis. 481, 43 N. W. 322; People ex rel. Hurd v. Johnson, 100 Ill. 537, 39 Am. Rep. 63.

<sup>58</sup> Councils of Reading v. Commonwealth, 11 Pa. 196, 51 Am. Dec. 534; People ex rel. Smith v. Olds, 3 Cal. 167, 58 Am. Dec. 398; People v. President, etc., of Village of Brooklyn, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502.

<sup>59</sup> People ex rel. Russell v. Inspectors, etc., of State Prison, 4 Mich. 187; In re Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Scripture v. Burns, 59 Iowa, 70, 12 N. W. 760.

<sup>60</sup> Deehan v. Johnson, 141 Mass. 23, 6 N. E. 240; People ex rel. United Auctioneers of New York v. Scully, 23 Misc. Rep. 732, 53 N. Y. Supp. 125.

But where an applicant has complied with all legal requirements, and the officer, without reason, refuses to issue the license, he may be compelled by mandamus. City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; People v. Perry, 13 Barb. (N. Y.) 206; Dean v. Campbell (Tex.) 59 S. W. 294; Bankers' Life Ins. Co. v. Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374.

<sup>61</sup> Board of Com'rs of Knox County v. Johnson, 124 Ind. 145, 24 N. E. 148, 7 L. R. A. 684, 19 Am. St. Rep. 88; State ex rel. Moulin v. City of New Orleans, 49 La. Ann. 1322, 22 South. 354.

<sup>62</sup> Parrott v. City of Bridgeport, 44 Conn. 180, 26 Am. Rep. 439.

<sup>63</sup> Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

<sup>64</sup> Where the statute authorized a county to subscribe for stock in a railroad company, and issue its bonds therefor, limiting its power to provide for the payment of them to an annual special tax of a certain percentage, and other laws authorized the levy of a tax for general purposes upon the assessed value of the taxable property of the county, it was held that in the absence of further legislation

signing of bonds in escrow issued under an unconstitutional statute;<sup>65</sup> the removal of electric poles from sidewalks;<sup>66</sup> the revocation of municipal permission for placing them there;<sup>67</sup> the delivery of a bank check;<sup>68</sup> the exclusion of territory from the municipal boundaries;<sup>69</sup> the removal of a picture from the rogues' gallery;<sup>70</sup> the closing of a contract with an alleged lowest bidder or other person;<sup>71</sup> or the performance of any other municipal or official duty, legislative, judicial, or discretionary, and especially where the relator's right is not plain and controlling, or he has other remedy at law.<sup>72</sup>

mandamus would not lie to compel the levy of a tax. *United States ex rel. Huidekoper v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331.

<sup>65</sup> Mandamus lies to compel a party to do that which it is his duty to do; but it confers no new authority, and the party to be compelled must have authority to do the act. *Commissioners of Brownsville Taxing Dist. v. Loague* (1888) 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780.

<sup>66</sup> Commonwealth ex rel. Dist. Atty. v. Borough of West Chester, 9 Pa. Co. Ct. R. 542.

Since the duties of municipal officers authorized to award contracts are not ministerial, but such officers are entrusted with discretionary authority, mandamus will not lie to compel them to change their decision on such question in the absence of fraud or collusion. *Potts v. City of Philadelphia*, 8 Pa. Dist. R. 728.

<sup>67</sup> Commonwealth ex rel. Dist. Atty. v. Borough of West Chester, *supra*; *Dechert v. Commonwealth*, 113 Pa. 229, 6 Atl. 229.

<sup>68</sup> *Anderson v. City of Detroit*, 124 Mich. 471, 83 N. W. 145.

<sup>69</sup> *Young v. Carey*, 80 Ill. App. 601. But see *Steele v. Willis*, 23 Ky. Law Rep. 826, 64 S. W. 417.

<sup>70</sup> *People ex rel. Joyce v. York*, 27 Misc. Rep. 658, 59 N. Y. Supp. 418.

<sup>71</sup> *Talbot Paving Co. v. City of Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604.

The discretion given by a city charter to the common council to let public contracts to the lowest bidder cannot be controlled by mandamus. *Brown v. City of Houston* (Tex. Civ. App.) 48 S. W. 760.

<sup>72</sup> *Cannon v. Board of Canvassers of Providence*, 24 R. I. 473, 53 Atl. 637; *Edward C. Jones Co. v. Town of Guttenberg*, 66 N. J. Law, 659, 51 Atl. 274; *Jones v. Fonda*, 85 App. Div. 265, 83 N. Y. Supp. 1012; *Storer Post, No. 1, G. A. R. v. Page*, 70 N. H. 280, 47 Atl. 264.

A writ of mandamus will only issue, requiring the officer to do something therein specified. *Hoover v. Reap*, 10 Kulp (Pa.) 59, 14

**QUO WARRANTO**

157. A quo warranto proceeding, either common-law or statutory, may be instituted against a municipality for usurping a public franchise, or against any person for usurping a municipal office.

The key to this writ is found in the literal translation of its name: "By what authority?" The writ issued in the name of the king to the person or corporation alleged as usurping a franchise or an office was a prerogative writ at common law, demanding of the defendant to show by what warrant or authority the holding of the office or exercise of the franchise could be justified; and upon failure of the defendant to show a proper legal warrant judgment of ouster followed.<sup>73</sup> The common-law writ is not in use in America;<sup>74</sup> but the principles controlling it are recognized as part of the common law, and control the proceedings on information in the nature of quo warranto prevailing in the United States, either under statute or by judicial recognition.<sup>75</sup> It may be used against a municipality upon information by the Attorney General for the purpose of testing certain power exercised by it, or the

York Leg. Rep. 62; United States ex rel. Mutual District Messenger Co. v. Wight, 15 App. D. C. 463.

But where there is a reasonable uncertainty of the right of an action at law, mandamus will lie. People ex rel. Pennell v. Treanor, 15 App. Div. 508, 44 N. Y. Supp. 528.

<sup>73</sup> It originally issued only at the instance of the sovereign against any person who usurped any franchises or liberty against the king, or for misuser or nonuser of franchises or privileges granted by him. State ex rel. Wilcox v. Curtis, 35 Conn. 374, 95 Am. Dec. 263; Commonwealth v. Murray, 11 Serg. & R. (Pa.) 73, 14 Am. Dec. 614.

<sup>74</sup> Dane v. Derby, 54 Me. 95, 89 Am. Dec. 722; Commonwealth ex rel. McLaughlin v. Cluley, 56 Pa. 270, 94 Am. Dec. 75.

<sup>75</sup> State ex rel. Attorney General v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697; State v. Harris, 3 Ark. 570, 36 Am. Dec. 460; State v. Evans, 3 Ark. 585, 36 Am. Dec. 468; People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242; Commonwealth ex rel. Clements v. Arrison,

validity of its charter.<sup>76</sup> The proceeding may likewise be instituted on private information against a person claiming a municipal office for the purpose of testing his title thereto.<sup>77</sup> A clear distinction in practice between mandamus and quo warranto for this purpose is shown in the rule that mandamus will not lie if there be color of title in the alleged usurper, for under this writ questions of title cannot be tried; neither can an incumbent be expelled from office;<sup>78</sup> whereas in quo warranto the question of title to the office is open for trial and decision, and the incumbent may be ousted from office.<sup>79</sup> But a private person cannot institute a proceeding in quo warranto to disturb a corporation, except under the approval of the attorney general; and even then not unless he have an interest in the subject-matter, and has not consented to the usurpa-

15 Serg. & R. (Pa.) 127, 16 Am. Dec. 531; People ex rel. Speed v. Hartwell, 12 Mich. 508, 86 Am. Dec. 70.

<sup>76</sup> Moore v. Seymour, 69 N. J. Law, 606, 55 Atl. 91; OSBORNE v. VILLAGE OF OAKLAND, 49 Neb. 340, 68 N. W. 506, Cooley, Cas. Mun. Corp. 347.

Quo warranto proceedings to oust a municipal corporation from the exercise of a franchise which it usurps must be brought against the corporation itself, and not against its officers. State ex inf. Crow v. Fleming, 158 Mo. 558, 59 S. W. 118; School Dist. No. 4 v. Smith, 90 Mo. App. 215; State ex rel. Jackson v. Mansfield, 99 Mo. App. 146, 72 S. W. 471; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385.

<sup>77</sup> Marshall v. Board of Managers of Illinois State Reformatory, 103 Ill. App. 65; Id., 201 Ill. 9, 66 N. E. 314; Ptacek v. People ex rel. Deneen, 94 Ill. App. 571; Id., 194 Ill. 125, 62 N. E. 530; Gilbert v. Craddock, 67 Kan. 346, 72 Pac. 869; Ellis v. Greaves, 82 Miss. 36, 34 South. 81; Miller v. Same, Id.; State ex rel. Weinsheim v. Leischer, 117 Wis. 475, 94 N. W. 299.

<sup>78</sup> Maxwell v. Board of Fire Com'rs of City and County of San Francisco, 139 Cal. 229, 72 Pac. 996; Ashwell v. Bullock, 122 Mich. 620, 81 N. W. 577; Pipper v. Carpenter, 122 Mich. 688, 81 N. W. 962; Lyon v. Board of Com'rs of Granville County, 120 N. C. 237, 26 S. E. 929.

<sup>79</sup> Deemar v. Boyne, 103 Ill. App. 464; Casey v. Chase, 64 N. J. 207, 44 Atl. 872; Roberson v. City of Bayonne, 58 N. J. Law, 326, 33 Atl. 734; Clayton v. Board of Chosen Freeholders of Hudson County, 60 N. J. Law, 364, 37 Atl. 725; Simon v. City of Hoboken, 52 N. J. Law, 367, 19 Atl. 259; Commonwealth ex rel. v. Connell, 5 Lack. Leg.

tion.<sup>80</sup> Generalizations upon this writ are hazardous. The safe path for its use can be found only by consulting the local statutes and decisions upon this proceeding.<sup>81</sup>

### CERTIORARI

**158. The corporate acts and proceedings of a municipality may be inquired into by certiorari to determine jurisdiction and validity.**

The common-law writ of certiorari cannot be employed in municipal affairs as a substitute for an appeal,<sup>82</sup> nor for the

N. (Pa.) 332; State ex rel. Nelson v. Mott, 111 Wis. 19, 86 N. W. 569; State ex rel. Kennedy v. Bratch, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477; State ex rel. Figley v. Conser, 24 Ohio Cir. Ct. R. 270; State ex rel. Keifer v. Wheatley, 160 Ind. 183, 66 N. E. 684; Lane v. Otis, 68 N. J. Law, 656, 54 Atl. 442; Nolen v. State ex rel. Moore, 118 Ala. 154, 24 South. 251; Gray v. State ex rel. Langham, 19 Tex. Civ. App. 521, 49 S. W. 699.

<sup>80</sup> Duffy v. State, 60 Neb. 812, 84 N. W. 264; State ex rel. Warner v. Agee, 105 Tenn. 588, 59 S. W. 340.

<sup>81</sup> In some states the courts have given judicial recognition to the modern substitute for the prerogative writ of the common law, and by decision and rule of court conformed the common-law procedure to the local statutes and practice; while in others the legislatures have by statute effected similar results. Each state, however, has its own peculiar method of proceeding in the nature of quo warranto, which is controlling in its courts.

<sup>82</sup> Eels v. Ballie, 118 Iowa, 519, 92 N. W. 668; State ex rel. Town of Jennings v. Miller, 109 La. 704, 33 South. 739; State ex rel. Norris Safe & Lock Co. v. Superior Court of King County, 30 Wash. 177, 70 Pac. 256; State ex rel. Rudy v. Tomkies, 49 La. Ann. 1162, 22 South. 336; Sowles v. Bailey, 69 Vt. 277, 37 Atl. 751; Lawler v. Lyness, 112 Ala. 386, 20 South. 574; State ex rel. Alderson v. Moehlenkamp, 133 Mo. 134, 34 S. W. 468; Jackson v. People, 9 Mich. 111, 77 Am. Dec. 491.

Common-law certiorari will not issue where the party has an adequate remedy by appeal. State ex rel. Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co., 100 Wis. 538, 77 N. W. 193; Oyster v. Bank, 107 Iowa, 39, 77 N. W. 523. See, also, Ex parte Howard-Harrison Iron Co., 130 Ala. 185, 30 South. 400; Walker v. Wantland, 2 Ind. T. 32, 47 S. W. 354; State ex rel. Bromade v. Judge of Division C, Civil District Court, 104 La. 103, 28 South. 839.

correction of errors of fact.<sup>83</sup> It is the proper writ for determining questions of jurisdiction,<sup>84</sup> and fatal errors of law in proceeding.<sup>85</sup> To determine either of these questions it may be sued out against a municipal corporation and its common council, or any other board or official exercising judicial functions, where no appeal or writ of error will lie.<sup>86</sup> Originally, this writ was confined to matters of judicial decision by inferior tribunals;<sup>87</sup> but the tendency of modern decision, and especially in the Code states, is to employ it for the purpose of revising obvious acts of injustice in municipal corporations, even in matters which are apparently ministerial.<sup>88</sup> It

<sup>83</sup> Somers v. Wescoat, 66 N. J. Law, 551, 49 Atl. 462; Nobles v. Piollet, 16 Pa. Super. Ct. 386; Appeal of Welsh, 22 Pa. Super. Ct. 392; Henkle v. Bussey, 50 La. Ann. 1135, 24 South. 240; Jackson v. People, 9 Mich. 111, 77 Am. Dec. 491; Morse, Williams & Co. v. Baake, 68 N. J. Law, 591, 53 Atl. 693; Wilson v. Mayor, etc., of City of Hudson, 32 N. J. Law, 365.

<sup>84</sup> State ex rel. Boston & M. Consol. Copper & Silver Min. Co. v. District Court of Second Judicial Dist., 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831; Nordyke & Marmon Co. v. McConkey, 7 Idaho, 562, 64 Pac. 893; Bardes v. Hutchinson, 113 Iowa, 610, 85 N. W. 797; State ex rel. Gaster v. Whitcher, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968; Sweeny v. Mayhew, 6 Idaho, 455, 56 Pac. 85; Butterfield v. Treichler, 113 Iowa, 328, 85 N. W. 19. See State ex rel. Attorney General v. Gill, 137 Mo. 627, 39 S. W. 81; Quinchard v. Board of Trustees of Alameda, 113 Cal. 664, 45 Pac. 856; Walls v. City of Jersey City, 55 N. J. Law, 511, 26 Atl. 828.

<sup>85</sup> State ex rel. Beise v. District Court of Hennepin County (In re Minnetonka Dam) 83 Minn. 464, 86 N. W. 455; Shoup v. Shoup, 205 Pa. 22, 54 Atl. 476; Home Savings & Trust Co. v. District Court of Polk County, 121 Iowa, 1, 95 N. W. 522; McKee v. Same, Id.

<sup>86</sup> People ex rel. Mershon v. Shaw, 34 App. Div. 61, 54 N. Y. Supp. 218; Morse v. Norfolk County, 170 Mass. 555, 49 N. E. 925; Devlin v. Dalton, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379; People ex rel. Babylon R. Co. v. Board of Railroad Com'rs of State of New York, 32 App. Div. 179, 52 N. Y. Supp. 908.

Certiorari will lie to review the decision of a board of commissioners consenting to the discontinuance of a station, such consent being a judicial act. People ex rel. Loughran v. Board of Railroad Com'rs, 158 N. Y. 421, 53 N. E. 163.

<sup>87</sup> Meads v. Belt Copper Mines, 125 Mich. 456, 84 N. W. 615.

<sup>88</sup> State ex rel. Crow v. Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867. It does not lie to annul proceedings of a board before it has

has accordingly been used with respect to proceedings in laying out, altering, or closing a public street,<sup>89</sup> and in regard to local assessments and other similar proceedings.<sup>90</sup>

### COMPLAINANT IN CHANCERY

159. A municipality may also resort to the court of chancery for the protection or enforcement of any equitable right or title or the use of any equitable remedy appropriate for its relief.

Equity as well as law lends its aid to municipal corporations in cases "wherein the law, by reason of its universality, is deficient"; and so in America the courts of chancery in those states where such tribunals survive, and, where they have succumbed to modernization, the courts clothed with equity jurisdiction will entertain the complaint of any municipality, and give it equitable remedy, wherever its equitable titles or rights have been denied, or it has suffered wrong for which the law affords no appropriate or sufficient remedy.<sup>91</sup> If a municipality is trustee or cestui que trust in a trust estate;

made the final order in the matter. *Gauld v. Board of Sup'rs of City and County of San Francisco*, 122 Cal. 18, 54 Pac. 272. But see *IN RE WILSON*, 32 Minn. 145, 19 N. W. 723, Cooley Cas. Mun. Corp. 349.

The action of a municipal board of health in determining a nuisance and ordering its abatement cannot be reviewed on certiorari. *Hartman v. City of Wilmington*, 1 Marv. (Del.) 215, 41 Atl. 74.

<sup>89</sup> *Dwight v. City Council of Springfield*, 4 Gray (Mass.) 107. See *Fredericks v. Hoffmeister*, 62 N. J. Law, 565, 41 Atl. 722; *People ex rel. Mershon v. Shaw*, 34 App. Div. 61, 54 N. Y. Supp. 218.

<sup>90</sup> *Wilson v. City of Seattle*, 2 Wash. St. 543, 27 Pac. 474; *People v. Cheritree*, 4 Thomp. & C. (N. Y.) 289; *People ex rel. Osborne v. Gilon*, 56 Hun, 641, 9 N. Y. Supp. 212; *Moore v. Perry*, 119 Iowa, 423, 93 N. W. 510.

<sup>91</sup> *Eaton*, Eq. pp. 16-18; *Folley v. City of Passaic*, 26 N. J. Eq. 216; *State v. Mayor, etc., of City of Jersey City*, 30 N. J. Law, 148. Cf. *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

if it hold a lien on or an interest in property, by mortgage or otherwise; if constructive or resulting trust may be implied in its favor; if it have suffered or is likely to suffer loss from accident, mistake, or fraud; if it be entitled to the specific performance, reformation, or rescission of a contract; if it may demand of others exoneration, subrogation, marshaling, accounting, contribution, or needs the protecting aid of the *puisant* writ of injunction, it may go into equity and claim relief upon the same terms and conditions as any other corporation or person.<sup>92</sup>

#### *Instances*

It has accordingly been held that the corporation may have relief in equity against illegal, unauthorized, or fraudulent acts of its officers;<sup>93</sup> that it may enjoin a person from carrying on a licensed business until he has paid the license fee;<sup>94</sup> that equity will enforce a tax lien in favor of a municipality;<sup>95</sup> that it will reform municipal bonds in the hands of holders with notice;<sup>96</sup> and that it will control a municipality in the execution of a trust committed to it for charitable purposes,<sup>97</sup>

<sup>92</sup> *Girard v. City of Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53 (trust); *Town of Essex v. Day*, 52 Conn. 483, 1 Atl. 620 (bonds); *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900; *Handley v. Palmer* (C. C.) 91 Fed. 948; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Chambers v. City of St. Louis*, 29 Mo. 543 (trust); *McInerny v. Reed*, 23 Iowa, 410 (lien); *City of New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399 (lien); *Bryant's Lessee v. McCandless*, 7 Ohio, 135, pt. 2.

<sup>93</sup> *Russell v. Tate*, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193; *Roper v. McWhorter*, 77 Va. 214; *Payne v. English*, 79 Cal. 540, 21 Pac. 952; *Clapp v. City of Spokane* (C. C.) 53 Fed. 515.

<sup>94</sup> *City of New Orleans v. Becker*, 31 La. Ann. 644.

<sup>95</sup> *McInerny v. Reed*, 23 Iowa, 410; *City of New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399.

<sup>96</sup> *Town of Essex v. Day*, 52 Conn. 483, 1 Atl. 620.

<sup>97</sup> In *Vidal v. Girard's Ex'rs* (1844) 2 How. (U. S.) 127, 11 L. Ed. 205, the court said: "Where a corporation [municipal] has this power [to take real and personal estate by deed and also by devise], it may also take and hold property in trust in the same manner and to the same extent that a private person may do. If the trust be re-

and may, if rendered necessary by the dissolution of a municipal corporation acting as such trustee, appoint its successor to that position.<sup>98</sup>

### DEFENDANT IN CHANCERY

160. Chancery will also grant equitable relief against a municipality whenever there is no adequate and unembarrassed remedy at law for the injury complained of; or to prevent a multiplicity of suits.

When neither the common-law actions nor the extraordinary remedies treated in this chapter can furnish adequate redress for wrong done or threatened by a municipality, the injured party may confidently appeal to equity for relief. "Generally speaking, equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in cases between other suitors. For the reason that these corporations are intrusted for defined objects, or for public purposes, with large powers, the courts have evinced some anxiety not to allow their authority to be used to oppress the inhabitants within their jurisdiction; and it may safely be affirmed that there is a remedy, according to the nature of the case, by certiorari, mandamus, quo warranto, prohibition, appeal, indictment, civil action, or in equity, for all injurious abuses of power and all invasions of the legal rights of persons subjected to municipal control or affected by

pugnant to or inconsistent with the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust."

<sup>98</sup> Neither the identity of a municipal corporation nor its right to hold property devised to it is destroyed by a change of name or an enlargement of its area. *Girard v. Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53.

municipal action."<sup>1</sup> The grounds of equitable jurisdiction have been adverted to in the preceding section, and upon any of them a creditor, taxpayer, contractor, or other person suffering an injury from a municipality relievable in equity may have the aid of its process and jurisprudence in the attainment of justice.<sup>2</sup>

*Dillon's Rules*

After an able and exhaustive consideration of the cases adjudged in the federal and state courts upon the right of taxpayers of a municipality to resort to a court of equity to prevent an illegal disposition of moneys of the corporation, or the illegal creation of a debt,<sup>3</sup> Judge Dillon, with his wonted acumen, sets forth the following conclusions upon equitable jurisdiction in such cases:<sup>4</sup>

"(1) The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting ultra vires, or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant.<sup>4</sup> But if in these cases the

<sup>1</sup> 2 Dill. Mun. Corp. § 908.

<sup>2</sup> One or more of the taxpayers of a city may sue to enjoin ultra vires of the city which may injure them as taxpayers. *City of Alpena v. Alpena Circuit Judge*, 97 Mich. 550, 56 N. W. 941.

But a bill in chancery against a municipal corporation to prevent a usurpation of power by the corporate authorities, or the violation of a duty imposed by law, may be filed by property holders or taxpayers. *New Orleans, M. & C. R. Co. v. Dunn*, 51 Ala. 128.

<sup>3</sup> The Liberty Bell (C. C.) 23 Fed. 843; *City of New London v. Brainard*, 22 Conn. 552; *City of Rock Island v. Huesing*, 25 Ill. App. 600; *Mitchell v. Wiles*, 59 Ind. 364.

<sup>4</sup> 4 Dill. Mun. Corp. (5th Ed.) § 1587.

<sup>5</sup> *Mayor, etc., of Baltimore v. Gill*, 31 Md. 375; *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Bissell v. City of Kankakee*, 64 Ill. 249, 21 Am. Rep. 554.

property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy.<sup>5</sup>

“(2) That, in the absence of special controlling legislative provision, the proper public officer of the commonwealth which created the corporation and prescribed and limited its powers may, in his own name, or in the name of the state on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts.<sup>6</sup>

“(3) That the existence of such a power in the state or its proper public law officer is not inconsistent with the right of any taxable inhabitant to bring a bill to prevent the corporate authorities from transcending their lawful powers, where the effect will be to impose upon him an unlawful tax or to increase his burden of taxation.<sup>7</sup> Much more clearly may this be done when the right of the public officer of the state to interfere is not admitted, or does not exist; and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly.”<sup>8</sup>

<sup>5</sup> Christie v. Malden, 23 W. Va. 667.

<sup>6</sup> People v. Lowber, 28 Barb. (N. Y.) 65; Bell v. City of Platteville, 71 Wis. 39, 36 N. W. 831; Steele v. Municipal Signal Co., 160 Mass. 36, 35 N. E. 105; Baldwin v. Wilbraham, 140 Mass. 459, 4 N. E. 829; Ketchum v. City of Buffalo, 14 N. Y. 356.

<sup>7</sup> Hodgman v. Chicago & St. P. Ry. Co., 20 Minn. 48 (Gil. 36); Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822; Lore v. Mayor, etc., of City of Wilmington, 4 Del. Ch. 575; Cook v. City of Burlington, 30 Iowa, 94, 6 Am. Rep. 649; Wood v. Draper, 24 Barb. (N. Y.) 187; Id., 4 Abb. Prac. 322.

<sup>8</sup> City of Springfield v. Edwards, 84 Ill. 626; City of Grayville v. Gray, 19 Ill. App. 120; Kelly v. Mayor, etc., of Baltimore, 53 Md. 134.

*Rule in New York*

From these conclusions the courts of New York dissent on the ground that private persons may not "assume to be champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts."<sup>9</sup>

*Special Instances*

Upon other matters' of equity it has been adjudged that equity will aid creditors of dissolved corporations to collect their debts from their successors;<sup>10</sup> will supply defects in municipal bonds resulting from the omission of the treasurer to countersign them;<sup>11</sup> may relieve against a contractual forfeiture;<sup>12</sup> will relieve lot owners against an unfair contract for local improvement.<sup>13</sup>

<sup>9</sup> Roosevelt v. Draper, 23 N. Y. 318. But this has since been changed by statute (Laws 1872, c. 161), and in this state a taxpayer may now maintain a suit in equity against a municipality for himself and all others in interest to enjoin an illegal contract. Armstrong v. Grant, 56 Hun, 226, 9 N. Y. Supp. 388; Newton v. Keech, 9 Hun (N. Y.) 355; Metzger v. Attica & A. R. Co., 79 N. Y. 171; Beebe v. Supervisors of Sullivan County, 64 Hun, 377, 19 N. Y. Supp. 629; West v. City of Utica, 71 Hun, 540, 24 N. Y. Supp. 1075.

<sup>10</sup> MT. PLEASANT v. BECKWITH, 100 U. S. 514, 25 L. Ed. 699, Cooley, Cas. Mun. Corp. 74.

<sup>11</sup> Melvin v. Lisenby, 72 Ill. 63, 22 Am. Rep. 141.

<sup>12</sup> Taylor v. City of Carondelet, 22 Mo. 105. See Maryland, to Use of Washington County, v. Baltimore & O. R. Co., 3 How. (U. S.) 534, 11 L. Ed. 714.

<sup>13</sup> Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205.

## INJUNCTIONS

161. Injunction is generally recognized and used as an appropriate remedy to be invoked both for and against the municipality for the protection of public and private rights, when irremediable loss or damage is menaced.

Formerly the courts of equity were averse to the use of the process of injunction to arrest the operations of municipal government, upon the ground that such drastic measures better befitted the courts of law, and that interference in governmental matters was not an appropriate function of equity. The reckless abuse of municipal power during the last half century, and the confusion of jurisdiction under the reform procedure, as well as the general tendency throughout the United States towards a relaxation of the old rules of practice, have concurred to incline the courts generally to a more liberal use of this potent process in municipal affairs; and it is now more freely granted than formerly, not only against, but for, municipalities for the prevention of irreparable injury.<sup>14</sup>

### *Illustrations*

Injunctions have accordingly been granted in cases without number to restrain the collection of taxes tainted with fraud, or levied or assessed without authority of law;<sup>15</sup> to prevent the issuance or delivery of municipal bonds invalid for like

<sup>14</sup> *Coast Co. v. Borough Spring Lake*, 56 N. J. Eq. 615, 36 Atl. 21; *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

But it will not lie to control the action of public agents, such as a state board of arbitration, acting under legislative authority, unless irreparable injury is apparent. *New Orleans City & L. R. Co. v. State Board of Arbitration*, 47 La. Ann. 874, 17 South. 418. See *Potts v. Philadelphia*, 23 Pa. Co. Ct. R. 212; *Borough of Shamokin v. Shamokin & M. C. E. R. Co.*, 196 Pa. 166, 46 Atl. 382.

<sup>15</sup> *Winkler v. Halstead*, 36 Mo. App. 25; *INTERNATIONAL TRADING STAMP CO. v. CITY OF MEMPHIS*, 101 Tenn. 181, 47

reasons; <sup>16</sup> to forbid the appropriation of corporate funds to objects unlawful or ultra vires; <sup>17</sup> to prevent the making of illegal contracts; <sup>18</sup> to restrain a tax sale and a void local as-

S. W. 136, Cooley, Cas. Mun. Corp. 351; *Fine v. Stuart* (Tenn.) 48 S. W. 371.

Equity may, by injunction, stay the collection of a tax when the law has conferred no authority to levy the tax, or where a person or officer not authorized by law to exercise such a power levies a tax, or when the proper persons make the levy for purposes on the face of the levy not authorized, or for fraudulent purposes. *Town of Ottawa v. Walker*, 21 Ill. 605, 74 Am. Dec. 121.

<sup>16</sup> *Town of Clarksdale v. Broaddus*, 77 Miss. 667, 28 South. 954; *Town of Winamac v. Huddleston*, 132 Ind. 217, 31 N. E. 561; *Hodgman v. Chicago & St. P. Ry. Co.*, 20 Minn. 48 (Gil. 36); *Lynch v. Eastern, L. F. & M. Ry. Co.*, 57 Wis. 430, 15 N. W. 743, 825. But not on the ground that the proceeds will pass into unauthorized hands. *City of Tampa v. Salomonson*, 35 Fla. 446, 17 South. 581; *Dunbar v. Board of Com'rs of Canyon County*, 5 Idaho, 407, 49 Pac. 409; *Board of Com'rs of Owen County v. Spangler*, 159 Ind. 575, 65 N. E. 743.

<sup>17</sup> Injunction will lie at the instance of a taxpayer to prevent the execution of a contract for public improvements stipulating that the contractor shall employ none but union labor. *Adams v. Brenan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222; *Webster v. Douglas County*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; *Murphy v. East Portland* (C. C.) 42 Fed. 308; *The Liberty Bell* (C. C.) 23 Fed. 843; *Mitchell v. Wiles*, 59 Ind. 364; *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W. 822.

Where the municipal corporation appropriates money, contrary to authority, to be expended in the celebration of Independence Day, injunction by taxpayers against the city and its treasurer is the appropriate remedy. *City of New London v. Brainard*, 22 Conn. 552; *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. 767; *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244; *City of Rock Island v. Huesing*, 25 Ill. App. 600; *Huesing v. City of Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129; *Wade v. City of Richmond*, 18 Grat. (Va.) 583; *Bayle v. City of New Orleans* (C. C.) 23 Fed. 843; *Simmons v. City of Toledo*, 5 Ohio Cir. Ct. R. 124. See *Miller v. Bowers*, 30 Ind. App. 116, 65 N. E. 559; *Board of Education of Territory v. Territory ex rel. Taylor*, 12 Okl. 286, 70 Pac. 792.

<sup>18</sup> *City of New London v. Brainard*, 22 Conn. 552; *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. 767; *Armstrong v. Grant*, 56 Hun, 226, 9 N. Y. Supp. 388; *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080; *City of Akron v. France*, 24 Ohio Cir. Ct. R. 63; *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128; *Id.*, 67 Neb. 388, 93 N. W. 747.

essment;<sup>19</sup> to prevent a change of street grade until the abutter's damages have been ascertained and paid;<sup>20</sup> to restrain the perversion of a public square to purposes inconsistent with the dedication;<sup>21</sup> to prevent the closing of a public street;<sup>22</sup> to enjoin trades or occupations which are intrinsically nuisances;<sup>23</sup> and to aid in the abatement or prevention of other public nuisance.<sup>24</sup>

### CRIMINAL PROSECUTION

**162. A municipality is indictable at common law for nonfeasance or misfeasance in respect of public duties imposed upon it by statute.**

This doctrine has received repeated recognition in the English courts, where it is so extended as to include prescriptive

<sup>19</sup> Holland v. Mayor, etc., of City of Baltimore, 11 Md. 186, 69 Am. Dec. 195; Landon v. City of Syracuse, 163 N. Y. 562, 57 N. E. 1114.

<sup>20</sup> Hurford v. City of Omaha, 4 Neb. 336. Injunction is the proper remedy to restrain a town from opening a street through a person's land, without first condemning it pursuant to law. Yates v. Town of West Grafton, 33 W. Va. 508, 11 S. E. 8. See Village of Itasca v. Schroeder, 182 Ill. 192, 53 N. E. 50.

<sup>21</sup> Village of Princeville v. Auten, 77 Ill. 325; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130; Cook v. City of Burlington, 30 Iowa, 94, 6 Am. Rep. 649; City of Pittsburg v. Epping-Carpenter Co., 194 Pa. 318, 45 Atl. 129; Sturmer v. County Court of Randolph County, 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

<sup>22</sup> Hesing v. Scott, 107 Ill. 600.

<sup>23</sup> Rounsville v. Kohlheim (stable) 68 Ga. 668, 45 Am. Rep. 505; Ashbrook v. Commonwealth (cattle pens) 1 Bush (Ky.) 139, 89 Am. Dec. 616; Ross v. Butler (cinders) 19 N. J. Eq. 294, 97 Am. Dec. 654; Catlin v. Valentine (slaughter-house) 9 Paige (N. Y.) 575, 38 Am. Dec. 567; Bishop v. Banks (bleating calves) 33 Conn. 118, 87 Am. Dec. 197; Coker v. Birge (stable) 9 Ga. 425, 54 Am. Dec. 347.

<sup>24</sup> City of Huron v. Bank of Volga, 8 S. D. 449, 66 N. W. 815, 59 Am. St. Rep. 769; City of Belton v. Central Hotel Co. (Tex. Civ. App.) 33 S. W. 297; TOWNSEND v. EPSTEIN, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441, Cooley, Cas. Mun. Corp. 254; Sammons v. City of Gloversville, 34 Misc. Rep. 459, 70 N. Y. Supp. 284.

as well as statutory duties; but in America indictments against municipal corporations have been confined to statutory offenses.<sup>25</sup> The duty may be enjoined in the charter or imposed by general statute.<sup>26</sup> A municipality is not indictable for a felony, since it is incapable of felonious intent, and can neither be hanged nor imprisoned;<sup>27</sup> nor, indeed, can it be guilty of any misdemeanor of which mala mens is an essential ingredient.<sup>28</sup> It is obvious, however, that for nonfeasance of a public duty a municipality may be guilty of a misdemeanor;<sup>29</sup> and it may also be indicted for misfeasance in creating a public nuisance;<sup>30</sup> and for the performance of other acts forbidden by law which work harm and annoyance to the public.<sup>31</sup> It has accordingly been held that a municipality is indictable for unlawfully obstructing a public highway;<sup>32</sup> also for neglecting its duty to keep its streets in reasonable repair;<sup>33</sup> and in Tennessee, and perhaps some other states, a municipality is indictable for permitting a public nuisance, such as a slaughter house,<sup>34</sup> which annoys the inhabitants and

<sup>25</sup> McClain, Cr. Law, § 182; 2 Dill. Mun. Corp. § 932.

<sup>26</sup> Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332; People v. Albany Corporation, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Wild v. Mayor, etc., of City of Paterson, 47 N. J. Law, 406, 1 Atl. 490.

<sup>27</sup> 1 Bouv. Law Dict. tit. "Felony."

<sup>28</sup> State v. Passaic County Agricultural Soc., 54 N. J. Law, 260, 23 Atl. 680.

<sup>29</sup> State v. Mayor, etc., of Town of Loudon, 3 Head (Tenn.) 263; Mayor, etc., of Town of Chattanooga v. State, 5 Snead (Tenn.) 578.

<sup>30</sup> People v. Albany Corporation, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Commonwealth v. Inhabitants of Gloucester, 110 Mass. 491.

<sup>31</sup> State v. Barksdale, 5 Humph. (Tenn.) 154.

<sup>32</sup> State v. Mayor, etc., of Town of Loudon, 3 Head (Tenn.) 264; State v. Dover, 46 N. H. 452.

<sup>33</sup> State v. Mayor, etc., of Town of Murfreesboro, 11 Humph. (Tenn.) 217; Mayor, etc., of Town of Chattanooga v. State, supra; Commonwealth v. Trustees of Hopkinsville, 7 B. Mon. (Ky.) 38; Davis v. City of Bangor, 42 Me. 522; Commonwealth v. City of Boston, 16 Pick. (Mass.) 442.

<sup>34</sup> State v. Shelbyville Corp., 4 Snead (Tenn.) 176.

The city of Albany was held indictable for neglect to do what the common good required, where it was authorized to direct the excavating, deepening, or cleansing of a basin connected with a river,

endangers public health. The same doctrine is also held in some states with regard to public sewers.<sup>35</sup> Municipalities have also been held indictable for neglect to erect a bridge pursuant to law imposing the duty,<sup>36</sup> and also for neglecting to keep municipal bridges in repair;<sup>37</sup> and in some states for neglecting to keep in repair bridges and abutments erected by railroad companies over their tracks where they cross the public streets.<sup>38</sup> Modern judicial tendency, like public sentiment, is towards assimilating corporations to natural persons in their liabilities, civil and criminal. This tendency finds apt expression in the following words of a Massachusetts judge: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason, or felony, or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them."<sup>39</sup>

so that it became fouled by the aggregation of mud and other substances, whereby a nuisance was created. *People v. Albany Corporation*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

<sup>35</sup> A borough on which is imposed the duty of making regulations necessary for the health and cleanliness of the borough may be indicted for permitting its sewers to become a public nuisance. *Commonwealth v. Bredin*, 165 Pa. 224, 30 Atl. 921.

*Contra, Georgetown v. Commonwealth*, 24 Ky. Law Rep. 2285, 73 S. W. 1011, 61 L. R. A. 673.

<sup>36</sup> *State v. Town of Whitingham*, 7 Vt. 390; *State v. Inhabitants of Madison*, 63 Me. 546; *State v. Inhabitants of Hudson County*, 30 N. J. Law, 137.

<sup>37</sup> *People v. Albany Corporation*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *Russell v. Men of Devon*, 2 Term R. 667; *Thomas v. Sorrell, Vaughan*, 330.

<sup>38</sup> *State v. Inhabitants of Gorham*, 37 Me. 457; *State v. City of Portland*, 74 Me. 268, 43 Am. Rep. 586.

<sup>39</sup> *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339.

## CHAPTER XVI

### QUASI CORPORATIONS—COUNTIES

- 163. Quasi Corporations.
- 164. Immunities.
- 165. Distinguishing Elements.
- 166. Counties.
- 167. Creation of Counties—Legislative Power.
- 168–169. Property—Public Use—Sovereign Power.
- 170. Government and Officers.
- 171–172. Powers of County Government.
- 173. Torts.
- 174. Power of Eminent Domain.
- 175. Police Power.

### QUASI CORPORATIONS

163. Quasi corporations include every local subdivision of a state, other than a municipality, created by general law as an agency of the state to effect the administration of public affairs and the enforcement of law.

Municipalities proper included incorporated villages, towns, and cities, having the powers of local legislation and administration.<sup>1</sup> They are usually called into existence at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience.<sup>2</sup> They are highly organized, possessing the usual attributes and incidents of a perfect corporation as

<sup>1</sup> Dill. Mun. Corp. (4th Ed.) § 22, p. 42; Beach, Mun. Corp. § 3, p. 7; City of Philadelphia v. Fox, 64 Pa. 169; Heller v. Stremmel, 52 Mo. 309.

<sup>2</sup> Dill. Mun. Corp. § 23; Beach, Mun. Corp. § 4, p. 8; BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; City of Philadelphia v. Fox, 64 Pa. 169.

recognized by the common law.<sup>3</sup> They have charters like other complete corporations, and are subject to the great body of the law of corporations, though with many exceptions on account of their public character. In short, they are full corporations, and therefore must be distinguished from quasi corporations, which are involuntary,<sup>4</sup> having no charter,<sup>5</sup> governed solely by the statute law of the state, and exercising only the particular administrative functions conferred upon them thereby.<sup>6</sup>

### *Quasi Corporations*

Quasi corporations have been held to include counties,<sup>7</sup> townships,<sup>8</sup> New England towns,<sup>9</sup> school districts,<sup>10</sup> road dis-

<sup>3</sup> Beach, Mun. Corp. § 3, p. 7; Cuddon v. Eastwick, 1 Salk. 192; Brickerhoff v. Board of Education, 37 How. Prac. (N. Y.) 499; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36.

<sup>4</sup> Beach, Mun. Corp. § 4; BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4.

<sup>5</sup> Dill, Mun. Corp. § 25; Smith, Mun. Corp. § 8: "Counties, townships, school districts, road districts, and like public quasi corporations do not usually possess corporate powers under special charters; but they exist under general laws of the state."

<sup>6</sup> In the case of BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, supra, the court said, with reference to counties: "They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them, \* \* \* superimposed by a sovereign and paramount authority." See Town of Freeport v. Board of Supervisors of Stephenson County, 41 Ill. 495, Cooley, Const. Lim. (6th Ed.) p. 294.

<sup>7</sup> Talbot County Com'r's v. Queen Anne's County Com'r's, 50 Md. 245; Pulaski County v. Reeve, 42 Ark. 55; BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4. See, also, Boone, Corp. § 10; Elliott, Mun. Corp. § 3.

<sup>8</sup> Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Damon v. Inhabitants of Granby, 2 Pick. (Mass.) 352.

<sup>9</sup> Commonwealth v. City of Roxbury, 9 Gray (Mass.) 451; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302—where it was said that the New England towns are involuntary corporations, having

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<sup>10</sup> See note 10 on following page.

tricts,<sup>11</sup> public commissioners,<sup>12</sup> boards of supervisors,<sup>13</sup> school trustees,<sup>14</sup> and other bodies "created for a public purpose as an agency of the state, through which it can most conveniently and effectually discharge the duties of the state as an organized government to every person, and by which it can best promote the welfare of all."<sup>15</sup> Considered with respect

given no assent to their creation, and having been incorporated by virtue of no contract, express or implied, with the state. In *Town of Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923, Gray, J., said: "Towns in Connecticut, as in the other New England states, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the state is divided by the Legislature, from time to time, at its discretion, for political purposes and the convenient administration of government. They have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the quasi corporation." *Town of Granby v. Thurston*, 23 Conn. 416; *Webster v. Town of Harwinton*, 32 Conn. 131; *Parsons v. Inhabitants of Goshen*, 11 Pick. (Mass.) 396; *Inhabitants of Norton v. Inhabitants of Mansfield*, 16 Mass. 48; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145.

<sup>10</sup> *Beach v. Leahy*, 11 Kan. 23; *Inhabitants of Fourth School Dist. in Rumford v. Wood*, 13 Mass. 193; *Harris v. School Dist. No. 10, in Canaan*, 8 Fost. (28 N. H.) 58; *Wilson v. School Dist. No. 4 in Chester*, 32 N. H. 118; *Foster v. Lane*, 30 N. H. 305; *Rogers v. People ex rel. Brewer*, 68 Ill. 154; *Scales v. Ordinary of Chattahoochee County*, 41 Ga. 225. A school district has been held to be included within the phrase "political or municipal corporation." *Clark v. Thompson*, 37 Iowa, 536. So, also, a township. *Curry v. District Tp. of Sioux City*, 62 Iowa, 104, 17 N. W. 191; *Winspear v. District Tp. of Holman*, 37 Iowa, 542. See, as to construction of word "town," *Stout v. Borough of Glen Ridge*, 59 N. J. Law, 201, 35 Atl. 913. See, also, *School Dist. No. 11 v. Williams*, 38 Ark. 454.

<sup>11</sup> *People v. Lathrop*, 19 How. Prac. (N. Y.) 358; *Levy Court v. The Coroner*, 2 Wall. 501, 17 L. Ed. 851; *Com'rs of Scioto v. Gherky, Wright (Ohio)* 493; *Lower Board of Com'rs of Roads for St. Peter's Parish v. McPherson*, 1 Speers (S. C.) 218.

<sup>12</sup> *Attorney General v. Andrews*, 2 Macn. & G. 226; *Hall v. Taylor, El. Bl. & El.* 107.

<sup>13</sup> *Pomeroy v. Wells*, 8 Paige (N. Y.) 406; *Todd v. Birdsall*, 1 Cow. (N. Y.) 260, 13 Am. Dec. 522.

<sup>14</sup> *Littlewort v. Davis*, 50 Miss. 403. See *Bassett v. Fish*, 75 N. Y. 303.

<sup>15</sup> *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517,

to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and hence they are called quasi (almost) corporations.<sup>16</sup> Though all in the same class, they are of different grades in the scale of corporate life, from the New England town, which so closely approximates the municipality as scarcely to be distinguishable from it in law,<sup>17</sup> down through the other public instrumentalities of various powers and functions to the school district, declared by the Supreme Court of New Hampshire to be a "quasi corporation of the most limited powers known to the law."<sup>18</sup> This variety of powers and rank results from the difference in the statutes creating and empowering these various corporations, which must always be consulted and carefully scrutinized to ascertain and determine the limit of powers, functions, and liabilities. Subject to statutory regulation, there are, of course, certain peculiar qualities and attributes common to all quasi corporations, which distinguish them from municipalities, and exempt them from the general law of corporations.

wherein also a quasi corporation is spoken of as "a subdivision of the state, created solely for a public purpose, by a general law applicable to all such subdivisions."

<sup>16</sup> Dill. Mun. Corp. § 25; Hamilton County v. Garrett, 62 Tex. 602.

<sup>17</sup> Town of Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923; Commonwealth v. City of Roxbury, 9 Gray (Mass.) 451; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302. In Warren v. Mayor and Aldermen of Charlestown, 2 Gray (Mass.) 84, the court said: "The marked and characteristic distinction between a town organization and that of a city is that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities, whereas in a city government this is all done by their representatives."

<sup>18</sup> Harris v. School Dist. No. 10, in Canaan, 8 Fost. (28 N. H.) 58.

**IMMUNITIES**

**164. Quasi corporations are not liable to private action against them for a breach of duty, unless such action be expressly given by statute.**

This has been taken as a chief mark of distinction between municipal corporations and quasi corporations. In the leading case of *Board of Com'rs of Hamilton County v. Mighels*,<sup>19</sup> in which judgment had been rendered in the court below against the county for neglect of public duty by its board of commissioners, the Supreme Court of Ohio, overruling a previous case,<sup>20</sup> reversed the judgment of the inferior court upon the ground that, "by the decisions of courts of justice and the treatises of learned men," the people of a county are not liable for the official delinquencies of their county commissioners, or other county officers, either on the principles or precedents of the common law.<sup>21</sup> In the course of the opinion expressing the reasons of the court for this decision, Brinkerhoff, J., said: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport,

<sup>19</sup> **BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS**, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4.

<sup>20</sup> *Brown County Com'rs v. Butt*, 2 Ohio, 348.

<sup>21</sup> **BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS**, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4. In this connection the court said: "It is undoubtedly competent for the Legislature to make the people of a county liable for the official delinquencies of the county commissioners, and, if they think it wise and just, without any power in the people to control the acts of the commissioners, or to exact indemnity from them. But this has not yet been done."

and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

*Reasons for*

It is familiar law that no action lies against the state for the neglect or misconduct of its officers; therefore none lies against the county, which is but an arm of the state for general administration; while a municipal corporation, being a voluntary organization for the special benefit of its people, is liable in many particulars for the neglect of its agents to perform official duty, resulting in injury to individuals.<sup>22</sup> The Ohio case above cited has been very generally followed in the courts of the United States for the past half century, and may be regarded as established law with regard not only to coun-

<sup>22</sup> Judge Dillon, in his *Commentaries on the Law of Municipal Corporations*, vol. 2, § 966 (4th Ed.) says: "As respects municipal corporations proper, whether specially chartered or voluntarily organized under general acts of the character alluded to, it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties; and it is the almost, but not quite, uniform doctrine of the courts that they are also liable where the wrong resulting in an injury to others consists in a mere neglect or omission to perform an absolute and perfect (as distinguished from a legislative, discretionary, quasi judicial, or imperfect) corporate duty." And, further: "What is termed a quasi corporation, though possessing full corporate capacity and a corporate purse, is not impliedly liable for acts of misfeasance or neglect of public duty on the part of its officers and agents, while for the same or a similar wrong there is such a liability resting on municipal or chartered corporations."

In *City of Chicago v. Railroad Co.*, 105 Ill. 73, Sheldon, J., said: "We recognize the doctrine to be that the unauthorized acts of municipal officers are regarded as the acts of the corporation, provided the acts are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular act relates."

ties, but also to all other quasi corporations.<sup>23</sup> The Ohio court rested its decision particularly upon the reason that the county had no fund out of which satisfaction could be made, and upon the authority of the leading English case of *Russell v. Men of Devon*,<sup>24</sup> the authority of which has been

<sup>23</sup> *Larkin v. Saginaw Co.*, 11 Mich. 88, 82 Am. Dec. 63; *Lesley v. White*, 1 Speers (S. C.) 31; *Carroll v. Board of Police of Tishamingo County*, 28 Miss. 38; *Soper v. Henry County*, 26 Iowa, 264; *Board of Chosen Freeholders of Sussex County v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530. In *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 6 Am. Dec. 63, which was an action against a town for an injury caused by a defect in a highway, Gray, C. J., says: "It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the Legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." See *Hill v. City of Boston*, 122 Mass. 344, 350, 23 Am. Rep. 332; *Weightman v. Washington Corp.*, 1 Black, 39-53, 17 L. Ed. 52; *Beardsley v. Smith*, 16 Conn. 375, 41 Am. Dec. 148; *Town of Union v. Crawford*, 19 Conn. 331; *Chidsey v. Town of Canton*, 17 Conn. 475; *Titler v. Iowa County*, 48 Iowa, 90; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Lorillard v. Town of Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *State v. Inhabitants of Hudson County*, 30 N. J. Law, 137; *Kincaid v. Hardin Co.*, 53 Iowa, 430, 5 N. W. 590, 36 Am. Rep. 236; *Hollenbeck v. Winnebago County*, 95 Ill. 148, 35 Am. Rep. 151.

In Indiana it is imperative upon the county to keep bridges in repair. It being empowered to appropriate money for that purpose, it is held impliedly liable for damages sustained by a traveler from a county bridge negligently allowed to remain out of repair. *House v. Board of Commissioners of Montgomery County*, 60 Ind. 580, 28 Am. Rep. 657; *Abbett v. Board of Com'rs of Johnson County*, 114 Ind. 61, 16 N. E. 127; *Board of Com'rs of Knox County v. Montgomery*, 109 Ind. 69, 9 N. E. 590. And in the New England States the doctrine does not apply to the towns where the duty is private or corporate, as distinguished from public; nor in the case where the wrongful act is in the nature of a trespass upon the property rights of others. *Ball v. Town of Winchester*, 32 N. H. 435, explained and limited by *Gilman v. Town of Laconia*, 55 N. H. 130, 20 Am. Rep. 175. See, also, *Weed v. Borough of Greenwich*, 45 Conn. 170.

<sup>24</sup> *Russell v. Men of Devon*, 2 Term R. 667.

generally recognized by the courts of this country.<sup>25</sup> Whether placed upon one ground or the other, or upon both, it may be regarded as the settled law of the land, and the same reasoning which applies to counties may be applied with greater force to other quasi corporations, all of which save the New England town, are of lower grade than the county. The same doctrine has also been repeatedly stated by the courts of New England in the decisions of cases brought against towns to recover damages for injury resulting from the neglect of town officials.<sup>26</sup>

<sup>25</sup> *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *White v. City Council of Charleston*, 2 Hill (S. C.) 571; *Ward v. Hartford County*, 12 Conn. 404; *Fowle v. Alexandria*, 3 Pet. (U. S.) 409, 7 L. Ed. 719; *Morey v. Town of Newfane*, 8 Barb. (N. Y.) 645.

<sup>26</sup> In *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541, where a town in Massachusetts had assumed the duties of a school district, and a scholar attending the public school was injured by reason of a dangerous excavation in the schoolhouse yard, owing to the negligence of the town officers, it was held that the town was not liable.

In the case of *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, the material facts were that the town of Meredith (defendant) built a townhouse, in which, among other things, to hold town meetings; the house, by reason of the negligence of those constructing it for the town, was defectively built, and the flooring gave way during a session of the town meeting, and the plaintiff was injured while in attendance upon said meeting. It was held that the plaintiff could not recover; and this decision was based mainly upon the ground, above stated, that a statute is necessary. It has been uniformly so ruled in New England since the early cases of *Riddle v. Proprietors of Merrimack River Locks and Canals*, 7 Mass. 169, 5 Am. Dec. 35, and *Mower v. Inhabitants of Leicester*, 9 Mass. 250, 6 Am. Dec. 63, in cases to subject towns to a civil action for neglect to perform a public duty.

## DISTINGUISHING ELEMENTS

165 Quasi corporations, notwithstanding the variety of their objects and functions, have other elements in common distinguishing them from municipal corporations proper and other bodies, and attaching them to this class of public corporations, among which are the following:

- (a) They have no charters.
- (b) They are involuntary organizations created by the sovereign power of the state of its own sovereign will, without the request and regardless of the wishes of the inhabitants.
- (c) They are created exclusively for purposes of civil administration.
- (d) They do not possess all the common-law powers implied from and incidental to corporate existence, but such only as are implied from the powers expressly granted, and the duties imposed upon them by statute or usage.

Quasi corporations are usually erected in pursuance of general law, applicable alike to all parts of the state,<sup>27</sup> and the powers conferred and the duties imposed upon each class of them are specified in the general law. Counties, though created and bounded by special statute, obtain their powers and functions from, and are charged with their duties by the general law, and none of these bodies can exist except under legislative enactment. But they are not required to possess, nor do they have, that documentary evidence of authority from the state presumed to be held by full corporations as evidence of their rights and powers.<sup>28</sup>

<sup>27</sup> City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

<sup>28</sup> Cooley, Const. Lim. (6th Ed.) pp. 294, 295.

*Popular Assent*

Private corporations can only be established by the assent and co-operation of the members. Municipal corporations may be, but rarely are, erected without the request or consent of the inhabitants of the proposed municipality. Quasi corporations are "superimposed by the sovereign and paramount authority"<sup>29</sup> of the state as agencies for civil government, without the request of the people of the locality, and whether they may wish them or not. "Whether they shall assume the duties or exercise the powers conferred, the people of the political division are not allowed the privilege of choice. The Legislature assumes such division of the state to be essential in republican governments, and the duties are imposed as part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty."<sup>30</sup>

*Local Benefits*

Under our form of government, the sovereign power over public affairs not committed to the federal government belongs to the state. Our theory is that the people rule; they ordain laws through their state Legislatures for the purposes of local government. For the enforcement of these laws and the administration of public affairs, various instrumentalities are required. Local self-government is a cherished inheritance of the Anglo-Saxon. To effect this, local agencies are essential, and counties, towns, districts, and local boards have been established for the more efficient administration of general laws throughout the state. They are not created for the special benefit of the people of the locality, but to insure the execution of the sovereign will in all parts of the state, and thereby pro-

<sup>29</sup> BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4. See, also, Harris v. School Dist. No. 10, in Canaan, 8 Fost. (28 N. H.) 58.

<sup>30</sup> Cooley, Const. Lim. (6th Ed.) pp. 294, 295. See, also, Scales v. Ordinary of Chattahoochee County, 41 Ga. 225; Granger v. Pulaski County, 26 Ark. 37; Palmer v. Fitts, 51 Ala. 489.

mote the general welfare.<sup>31</sup> It results, of course, that the people of each locality are benefited by the local administration under these quasi corporations; but this is in consequence of the public policy of the state and the wholesome effect of the administration of the general law. No particular privileges or franchises, no special rights or favors, are conferred on these quasi corporations. The powers, rights, duties, and functions are wholly of a public nature.<sup>32</sup>

#### *Inherent Powers*

Corporations generally possess certain powers impliedly attached to them as incidental to their existence as such, among which are perpetual succession, a corporate name whereby to contract, receive, hold, and grant title, to sue and be sued, purchase and hold property, have a common seal, make by-laws, and remove members.<sup>33</sup> Since quasi corporations are not full

<sup>31</sup> In BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4, already cited, Brinkerhoff, J., said: "A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." See, also, Boalt v. Williams County Commissioners, 18 Ohio, 16; Ward v. Hartford County, 12 Conn. 406.

<sup>32</sup> Judge Cooley, in his treatise on Constitutional Limitations (6th Ed.) p. 295, says, with reference to quasi corporations: "Usually their functions are wholly of a public nature, and there is no room to imply any contract between them and the state, in their organization as corporate bodies, except that which springs from the ordinary rules of good faith, and which requires that the property they shall acquire, by local taxation or otherwise, for the purposes of their organization, shall not be seized by the state, and appropriated in other ways. They are therefore sometimes called quasi corporations to distinguish them from the corporations in general, which possess more completely the functions of an artificial entity."

<sup>33</sup> Clark, Priv. Corp. § 51; Elliott, Priv. Corp. § 140. In Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 63, it was said: "While a corporation has no powers except those which are conferred by its char-

corporations completely organized and empowered by charter to act in many respects as a natural person, but are merely state agencies and instrumentalities for governmental purposes, all implied rights and powers attributed to municipal corporations by common law are not possessed by quasi corporations.<sup>34</sup> They may not have a common seal, nor make by-laws, nor remove members; and yet their nature is such that obviously they have perpetual succession and a corporate name, and they may purchase and hold property necessary for the performance of their functions. They are so unlike the public corporations of England that the rules of the common law cannot be indiscriminately applied to them.<sup>35</sup> And yet wherein the purposes of organization and mode of operation of the quasi corporations in this country are identical with similar bodies in England the rules of the common law are applicable. This is illustrated by the fact that very generally in America the courts have recognized and followed, in decisions affecting the liability of counties and other quasi corporations, the leading English case of *Russell v. Men of Devon*.<sup>36</sup> The usual rules adopted by the courts for determining the rights and functions and limitations of power of quasi corporations

ter, it is not requisite that these powers should be expressly granted, but it possesses impliedly, and incidentally all such powers as are necessary for the purpose of carrying into effect those which are expressly granted. The creation of a corporation for a specified purpose implies a power to use the means necessary to effect that purpose." See *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855; *People ex rel. Moloney v. Pullman's Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 11 Mass. 315.

<sup>34</sup> *Inhabitants of Fourth School Dist. in Rumford v. Wood*, 13 Mass. 193.

<sup>35</sup> Elliott, *Mun. Corp.* § 11; 1 Dill. *Mun. Corp.* §§ 32-44.

<sup>36</sup> 2 Term R. 667; *Taylor v. Salt Lake County Court*, 2 Utah, 405. See *Lyell v. St. Clair County*, 3 McLean (U. S.) 580, Fed. Cas. No. 8,621; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *Sharp v. Contra Costa County*, 34 Cal. 284; *Ward v. Hartford County*, 12 Conn. 404; *Rock Island County v. Steele*, 31 Ill. 543; *Anderson v. State*, 23 Miss. 459.

are the canons of construction applied to statutory law.<sup>37</sup> The statute confers certain express powers; the courts recognize whatever implied powers are essential to carry out the express powers, having in view the purpose and object of the organization. The nature and extent of these powers will be considered hereinafter in connection with each of the several classes of quasi corporations separately noticed.

## COUNTIES

**166. The county, as the oldest, commonest, and best known of all the members of its class, is recognized as the type of the quasi corporation; and the decisions in cases involving the rights, powers, and liabilities of counties, being the most numerous and important, comprise the body of the law in relation to this class of public corporations.**

The American county, being an adaptation of the English shire to the public wants and conveniences in a newly settled country, is to be found by that name of French origin in every one of the United States save Louisiana, a state of French origin, where it still retains the peculiar English name "parish." The county is the largest permanent subdivision of the state, and, however much its nature, functions, and powers may differ in the various states, it is everywhere recognized as a quasi corporation, notwithstanding the fact that in some of the states, where cities have grown and extended until the municipal territory includes the whole county, will be found close analogies to the English county corporate.<sup>38</sup> It is not to be supposed, however, that, because of the universality of this organization in the American commonwealth, the decisions

<sup>37</sup> 1 Dill. Mun. Corp. (4th Ed.) §§ 89-91, where the rules of construction are very learnedly and copiously discussed.

<sup>38</sup> See Standard Dictionary, subject "County Corporate"; Encyclopedia Americana, in verb.

of the supreme court of each state are to be considered as authority in other states in regard to the powers and functions of these civil divisions of the state. These powers and functions are dependent in each state not only upon the constitutional and statutory law of the state, but also upon the local conception of the county existing in that state, growing out of its origin, history, and traditions. But these decisions are consistent and uniform as to the general nature of this organization, as declared by the Supreme Court of Ohio,<sup>39</sup> and adopted by Judge Dillon as correctly expressing the local character and functions of such bodies: "Counties are at most local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them."<sup>40</sup>

#### *Counties, North and South*

Notwithstanding the general, if not unanimous, concurrence of the courts of the other states in this view of the county as a quasi corporation, there is a fundamental political distinction between the counties of New England and of the states south of the Potomac river, having its origin in colonial times, and finding its expression in the Western states settled chiefly by the inhabitants from those respective portions of the country. In the Southern states the county is the unit of political organization and administration, and that is therefore a close approximation to the corporation. It has been laid out merely as a part of the governmental machinery, and is subdivided into districts or townships for the more efficient performance of

<sup>39</sup> BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4.

<sup>40</sup> BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, supra, quoted by Judge Dillon in his *Commentaries on Municipal Corporations* (4th Ed.) § 23; ASKEW v. HALE COUNTY, 54 Ala. 639, 25 Am. Rep. 730, Cooley, Cas. Mun. Corp. 355.

neighborhood governmental functions.<sup>41</sup> In the New England states, on the contrary, the town is the administrative unit, governed by its peculiar and praiseworthy town meeting;<sup>42</sup> and a county is but a collection of these towns. As a consequence, in all the Southern states, formed for the most part upon the Virginia model, the county has a full set of officers, who are charged with the supervision or performance of all functions of local government.<sup>43</sup> Under the New England plan, however, the powers and functions of a county are few, and pertain chiefly to the maintenance of county buildings, the granting of licenses, and a partial control over highways. Here it was originally created solely for the performance of functions connected with the judicial department of the state, the ordinary ministerial and administrative functions of government being left to the towns; but in the course of time and the progress of development some of these town functions, in a greater or less measure in the various states, have been conferred upon the counties, though the town still remains the political unit.<sup>44</sup> In the Middle states, under the aggressive and dominant influence of the conflicting ideas of Massachusetts and Virginia, an amalgamated system of local government was formed, and the county consequently embodies an intermediate legal relation between the counties of New England and those of the Southern states. This system, which distributes affairs of local administration in about equal

<sup>41</sup> Elliott, *Mun. Corp.* § 6.

<sup>42</sup> Thomas Jefferson wrote: "Those wards called 'townships' in New England are the vital principle of their governments, and have proved themselves the wisest inventions ever devised by the wit of man for the perfect exercise of self-government and for its preservation." Jeff. Cyc. in verb.

<sup>43</sup> "The Southern settlers adopted the county as the unit of administration, while the immigrants from New England carried with them their ideas of the importance of the town, and the town meeting. In New England the county was originally created solely for judicial purposes, although in the process of time certain other functions have been taken from the township and conferred upon it." Elliott, *Mun. Corp.* § 6.

<sup>44</sup> 1 Dill. *Mun. Corp.* §§ 28-30.

parts between the county and town or township, is the one existing in the Middle states of New York and Pennsylvania, and commonly prevailing also in the great central states of the Mississippi Valley.<sup>45</sup> It is to be remembered that, under whatever system the county is organized, the state Constitution and the statute under which it is erected are the measure and chart of its functions and powers.

### CREATION OF COUNTIES—LEGISLATIVE POWER

167. Every county exists as a result of a sovereign act of legislation, either constitutional or statutory, separating it from the rest of the state as an integral part of its territory, and establishing it as one of the primary divisions of the state for the purposes of civil administration.

Counties may be established by an ordinance of the organic law, but they are usually created by special act of Legislature,

<sup>45</sup> This is known as the "compromise system," being a compromise between the New England town system and the Southern county system. The compromise system was developed in New York and Pennsylvania; but the present system in use in Pennsylvania is called the "commissioner form" of this system, and the county authority consists of commissioners elected by the people of the county at large; while under the supervisor, or New York, form, the governing board is composed of supervisors elected from the towns composing the county. This form of the compromise system is found also in Michigan, Illinois, Nebraska, Wisconsin, and Virginia, although in the last-named state the form is somewhat modified. The commissioner form of the system, in addition to Pennsylvania, already mentioned, exists in Kansas, Missouri, Iowa, Indiana, and Ohio, and in a modified form in Minnesota, North and South Dakota, Maine, and Massachusetts, and, according to 1 How. Local Const. Hist. p. 439 (cited by Dr. Elliott in his Principles of the Law of Public Corporations, § 5, note 2), has "been very generally adopted as the form for the county authority in the commonwealths of the South, where there are in the county generally no lesser districts to be represented."

setting forth the name, territorial boundaries, and county seat.<sup>46</sup> This act of legislation, being an exercise of sovereign legislative power, and solely for public purposes, is limited and restrained in its scope and effect only by the provisions of the state constitution.<sup>47</sup> These restraints are commonly such as insure sufficient territory and population and prevent undue encroachment upon the territory of existing counties.<sup>48</sup> This special act also commonly provides the date when the county shall assume its functions, and names commissioners for the purpose of doing the acts necessary to bring it into existence. This special act is in no sense a charter, and does not express the powers, functions, duties, and liabilities of the county thus created. These are to be found in the Constitution and statutes which provide for the organization of the state government, the division of its territory into counties, and express the governmental powers and functions conferred upon them.<sup>49</sup>

### *Popular Consent*

In some states the Constitution requires some popular expression of consent as a condition precedent to the erection of a new county. The determination by the Legislature of the existence of the functions necessary to the formation of a

<sup>46</sup> Elliott, *Mun. Corp.* § 20.

<sup>47</sup> State ex rel. Attorney General v. Dorsey County, 28 Ark. 378; Wade v. City of Richmond, 18 Grat. (Va.) 583; State ex rel. Slipp v. McFadden, 23 Minn. 40; State ex rel. Attorney General v. Board of Commissioners of Pawnee County, 12 Kan. 426.

<sup>48</sup> As an instance of these restraints, the Constitution of Tennessee (article 10, § 4) provides: "New counties may be established by the legislature to consist of not less than two hundred and seventy-five square miles, and which shall contain a population of seven hundred qualified voters; no line of such county shall approach the courthouse of any old county from which it may be taken nearer than eleven miles, nor shall such old county be reduced to less than five hundred square miles."

<sup>49</sup> PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 108, Cooley, *Cas. Mun. Corp.* 36; City of Chicago v. Wright, 69 Ill. 326; Astor v. Mayor, etc., of City of New York, 62 N. Y. 567; United States ex rel. Brown v. Memphis, 97 U. S. 284, 24 L. Ed. 937.

new county cannot be assailed in any court by evidence alii-unde.<sup>50</sup> In case the de facto doctrine has been applied to counties illegally organized, and the acts of the county officers are declared binding upon the people and territory of such county,<sup>51</sup> a state may be estopped by its repeated acts of recognition of a county from questioning the regularity of the passage of the act creating it.<sup>52</sup> An act creating a new county, and embracing therein a portion of an old county before the voters therein had signified their consent as required by the organic law, is void.<sup>53</sup>

#### *Legislative Control*

Legislative control over counties is so complete that it may change the lines between existing counties, take portions of existing counties to create new counties, and dissolve a county by attaching its territory to other counties.<sup>54</sup> This power, however, like all others, must be exercised in the manner and subject to the conditions prescribed by the Constitution; and the failure to comply with a constitutional condition precedent will render such act of dissolution or reduction void, and the legal status of the county will be unaffected thereby.<sup>55</sup>

<sup>50</sup> *Fraser v. James*, 65 S. C. 78, 43 S. E. 292. See *People ex rel. Love v. Nally*, 49 Cal. 478. This was a submission to the people of the county of the question of annexation of a portion of an adjoining county.

<sup>51</sup> *Garfield Tp. v. Finnup*, 8 Kan. App. 771, 61 Pac. 812.

<sup>52</sup> *People ex rel. Attorney General v. Alturas County*, 6 Idaho, 418, 55 Pac. 1067, 44 L. R. A. 122.

<sup>53</sup> *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677.

<sup>54</sup> *In re Division of Howard County*, 15 Kan. 194. See, also, *Opinion of Supreme Court Judges on Township Organization Law*, 55 Mo. 295; *Town of Freeport v. Board of Supervisors of Stephenson County*, 41 Ill. 495; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552.

<sup>55</sup> *Marion County v. Grundy County*, 5 Sneed (Tenn.) 490; *Bradley v. Com'rs*, 2 Humph. 428, 37 Am. Dec. 563; *Roane County v. Anderson County*, 89 Tenn. 259, 14 S. W. 1079; *Union County v. Knox County*, 90 Tenn. 541, 18 S. W. 254.

**PROPERTY—PUBLIC USE—SOVEREIGN POWER**

**168.** Counties have the implied power, as incidental to their objects and existence, to take and hold such real estate as may be essential and useful for county purposes.

**169.** Such property is held for the public use, and subject to the sovereign power of the state.

This power to purchase and hold sufficient real estate to enable the county to discharge all its public functions is essential to it as an agency of the state for more efficient government; and, where the legislature has omitted to give the county the express power to take and hold necessary real property, the courts readily imply the same as reasonably necessary and proper for the execution of the powers expressly granted, as in case of private corporations.<sup>56</sup> This would include in New England, where the county functions are few, such real estate as is necessary for the convenience of a courthouse and jail; and in the South, where these functions are most numerous, the taking and holding of title to as much realty as may be necessary not only for courthouses and jails, but also for workhouses and poor-farms, reformatories and asylums.<sup>57</sup>

*Legislative Control*

The county, being only an agency of the state, holds such property for its constituent sovereign, and subordinate to its rights and power of disposition.<sup>58</sup> The Legislature, as the trustee for and representative of the general public, has full

<sup>56</sup> *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *Hayward v. Davidson*, 41 Ind. 212; *Board of Sup'rs of Warren County v. Patterson*, 56 Ill. 111; *Clark, Priv. Corp.* §§ 51, 52.

<sup>57</sup> *Board of Sup'rs of Warren County v. Patterson*, 56 Ill. 111; *Hayward v. Davidson*, 41 Ind. 212; *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178.

<sup>58</sup> *Stone v. City of Charlestown*, 114 Mass. 214; *People v. Ingersoll*, *supra*; *Smith v. City of Leavenworth*, 15 Kan. 81.

power and control over the public property held by the county.<sup>59</sup> The only limitations upon this power are those expressed in the state and federal Constitutions.<sup>60</sup> Unless so restrained, the Legislature may by valid law compel the county to purchase and hold appropriate and necessary real estate, or may in its discretion compel the sale thereof, and cover the purchase price into the public treasury.<sup>61</sup>

### GOVERNMENT AND OFFICERS

170. The administration of county affairs is committed by law to an official body chosen by the people, and invested with discretionary power necessary for the efficient exercise of their powers, functions, and duties; and by whatever name this body may be called, whether supervisors or commissioners, board or court, it constitutes the county government.

Sheriffs, coroners, clerks and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county; their duties are ministerial, and, though local officers, their duties are performed in the name of the state, and for the general welfare.<sup>62</sup> Certain county duties are connected with these offices which pertain to county affairs; but they are usually ministerial only, and do not involve the control or management

<sup>59</sup> Jefferson County Com'rs v. People ex rel. Griggs, 5 Neb. 136, wherein it was held that, a county being justly indebted under a contract for the erection of public buildings therein, the Legislature may require it to issue its bonds to pay such indebtedness.

<sup>60</sup> Dill. Mun. Corp. § 65; State ex rel. Slipp v. McFadden, 23 Minn. 40; State ex rel. Attorney General v. County of Dorsey, 28 Ark. 378.

<sup>61</sup> People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Shanklin v. Madison County Com'rs, 21 Ohio St. 575.

<sup>62</sup> BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; Tuthill v. City of New York, 29 Misc. Rep. 555, 61 N. Y. Supp. 968; Bouv. Law Dict. sub-

of county affairs, which necessarily require the exercise of discretionary power.<sup>63</sup>

### *County Government—Of What Constituted*

The county government, properly so called, is composed of a board of commissioners, a board of supervisors, or a county court, including the justices of the county, presided over by a chairman chosen by the body, or a county judge elected by the people.<sup>64</sup> This body resembles a city council or board of aldermen in a municipality, and in some particulars also a board of directors in a private corporation.<sup>65</sup> It directs, manages, and controls the county affairs, and is vested with all necessary power and discretion for so doing.<sup>66</sup> These affairs are exclusively public, but are such as pertain peculiarly to local interest and welfare of the county, and affect the county revenues and treasury. In all such affairs this body governs and controls, and is therefore properly called the county government.<sup>67</sup>

ject "Sheriffs"; Texas & P. Ry. Co. v. Walker, 93 Tex. 611, 57 S. W. 568. See, also, Bouldin v. Lockhart, 3 Baxt. (Tenn.) 263; Braden v. Stumph, 16 Lea (Tenn.) 581; Dougherty County v. Kemp, 55 Ga. 252.

<sup>63</sup> South v. Maryland, 18 How. (U. S.) 396, 15 L. Ed. 433; Bell v. Mobile & O. Railroad Co., 4 Wall. (U. S.) 598, 18 L. Ed. 338; State v. Coit, 8 Ohio S. & C. P. Dec. 62.

<sup>64</sup> Elliott, Mun. Corp. § 5; Kankakee County v. Aetna Life Ins. Co., 106 U. S. 668, 2 Sup. Ct. 80, 27 L. Ed. 309; Moultrie County v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; Shanklin v. Madison County Com'rs, 21 Ohio St. 575.

<sup>65</sup> Pegram v. Cleaveland County Com'rs, 65 N. C. 114; Sterling v. Parish of West Feliciana, 26 La. Ann. 59.

<sup>66</sup> Shanklin v. Madison County Com'rs, 21 Ohio St. 575; State ex rel. Mason v. Board of County Com'rs of Ormsby County, 7 Nev. 392; Sheboygan County v. Parker, 3 Wall. (U. S.) 93, 18 L. Ed. 33; Ezell v. Giles County Justices, 3 Head (Tenn.) 586; Louisville & N. R. R. Co. v. Davidson County Court, 1 Snead (Tenn.) 639, 62 Am. Dec. 424; Bridgenor v. Rodgers, 1 Cold. (Tenn.) 261.

<sup>67</sup> Boone, Corp. § 316; Stewart v. Roberts, 1 Yerg. (Tenn.) 389; Maury County v. Lewis County, 1 Swan (Tenn.) 239.

## POWERS OF COUNTY GOVERNMENT

171. The county government has only such powers as are expressly conferred by statute, or necessarily implied therefrom.
172. In the exercise of lawful discretion the county board or court may—
  - (a) Employ attorneys.
  - (b) Purchase, hold, and sell real estate.
  - (c) Contract for the construction and furnishing of county buildings.
  - (d) Provide for the support of the poor, and the maintenance of county schools.
  - (e) And, generally, contract for any object within the scope of the duties and powers of the county.

Chief among the powers of the county government is the power to contract in the name of the county, and for its benefit.<sup>68</sup> Without this power no business can be wisely transacted. The county board or court is general agent and trustee for the county in all its affairs.<sup>69</sup> It must have general supervision and management of all county affairs, but must necessarily intrust matters of detail to individual attention and personal supervision of its agents. As a general rule, a contract on behalf of the county must be made by the body in lawful session.<sup>70</sup> In such case, of course, the memorandum of the contract is written on the minutes; but it may also con-

<sup>68</sup> Hopkins v. Clayton County, 32 Iowa, 15; Ellis v. Washoe County, 7 Nev. 291; Montgomery County v. Barber, 45 Ala. 237; Babcock v. Goodrich, 47 Cal. 488; Highland County Com'rs v. Rhoades, 26 Ohio St. 411.

<sup>69</sup> Andrews v. Pratt, 44 Cal. 309; Board of Sup'rs of Richmond County v. Wandel, 6 Lans. (N. Y.) 33; Board of Com'rs of Bladen County v. Clarke, 73 N. C. 255.

<sup>70</sup> Clarke v. Lyon County, 7 Nev. 75; Talbott v. Iberville Parish, 24 La. Ann. 135; Mitchell v. Leavenworth County Com'rs, 18 Kan. 188.

tract by parol through its agents in small matters.<sup>71</sup> An unauthorized contract, if within the scope of the county powers, may be made binding by ratification;<sup>72</sup> but contracts made beyond the scope of the lawful powers of the county are subject to the general doctrine of ultra vires.<sup>73</sup>

In varying but appropriate language the statutes of the states have conferred upon these county governing bodies the power to do such acts as are necessary for the management of the county affairs. This is a general expression covering the implied powers of a corporation, and is probably not essential to clothe the county government with such powers. Having the power to sue and be sued, the county, of course, must be represented by counsel. It has therefore been adjudged in numerous cases that the county government has power in its discretion to employ an attorney to represent and act for the

<sup>71</sup> *Ring v. Johnson County*, 6 Iowa, 265; *Montgomery County v. Barber*, 45 Ala. 237; *Hopkins v. Clayton County*, 32 Iowa, 15; *Babcock v. Goodrich*, 47 Cal. 488; *Ellis v. Washoe County*, 7 Nev. 291; *Highland County Com'rs v. Rhoades*, 26 Ohio St. 411; *Beck v. Puckett*, 2 Tenn. Cas. 490.

<sup>72</sup> *Hawk v. Marion County*, 48 Iowa, 472; *Talbott v. Iberville Parish*, 24 La. Ann. 135; *Clarke v. Lyon County*, 7 Nev. 75; *Mitchell v. Leavenworth County Commissioners*, 18 Kan. 188. But ratification cannot validate acts void for want of power. *Wallace v. Tipton County*, 3 Tenn. Cas. 542; *Colburn v. Chattanooga Western Railroad Co.*, 94 Tenn. 48, 28 S. W. 298.

<sup>73</sup> *King v. Mahaska County*, 75 Iowa, 329, 39 N. W. 636. A contract by county authorities for building a courthouse provided that changes thereafter made in the plan, increasing or lessening the cost, should be followed by like changes in the amount to be paid for the building, which was the full sum authorized by vote of the people under a law requiring the question to be submitted to them. It was held that changes imposing liability for more than the sum voted were void. See, also, *Burnett v. Maloney*, 97 Tenn. 712, 37 S. W. 689, 34 L. R. A. 541; *CLAIBORNE COUNTY v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, *Cooley, Cas. Mun. Corp.* 366.

An agreement between the board of commissioners of a county and an attorney, whereby, in return for services in aiding the state's attorney to collect taxes against railroad lands, he is to receive 25 per cent. of any amount recovered, either in money or lands, out of which one-fifth is to be paid the state's attorney, was held ultra

county in its litigation, actual or prospective;<sup>74</sup> and it may exercise this power even in cases which the law provides shall be prosecuted by the state's attorney.<sup>75</sup> But this employment is not binding beyond the term of office of the board making the contract.<sup>76</sup>

#### *Buying, Holding and Selling Real Estate by County*

In the due discharge of its public functions it is necessary for the county to have real estate on which to erect county buildings, such as courthouses, jails, workhouses, reformatories, and the like. The county court or board, therefore, has power to purchase and hold sufficient real estate on which to erect all necessary public buildings; and, where the support of the poor devolves upon the county, it may also purchase a farm therefor.<sup>77</sup> The courthouse and jail must, of course,

vires as to the commissioners, and void. *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23.

In *Grannis v. Board of Com'rs of Blue Earth County*, 81 Minn. 55, 83 N. W. 495, an agreement between the commissioners and an attorney, under which the attorney was to unearth and bring to light personal property in the county which had not been assessed or taxed for a number of years, in consideration of which service the board of commissioners agreed by resolution to pay him a compensation equal to one-half of all taxes paid into the county treasury as the result of his labors, was held to be void, as being ultra vires. See, also, *Municipal Security Co. v. Baker County*, 39 Or. 396, 65 Pac. 369. But see *American Stave & Cooperage Co. v. Butler Co. (C. C.)* 93 Fed. 301.

<sup>74</sup> *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Ottawa Gaslight & Coke Co. v. People*, 138 Ill. 336, 27 N. E. 924; *Franklin County v. Layman*, 34 Ill. App. 606; *Tatlock v. Louisa County*, 46 Iowa, 138; *Bevington v. Woodbury County*, 107 Iowa, 424, 78 N. W. 222; *Duluth S. S. & A. R. Co. v. Douglass County*, 103 Wis. 75, 79 N. W. 34.

<sup>75</sup> *Jordan v. Osceola Co.*, 59 Iowa, 389, 13 N. W. 344; *Taylor County v. Standley*, 79 Iowa, 666, 44 N. W. 911; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

<sup>76</sup> *Board of Com'rs of Jay County v. Taylor*, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160; *Vacheron v. City of New York*, 34 Misc. Rep. 420, 69 N. Y. Supp. 608.

<sup>77</sup> *Holten v. Board of Com'rs of Lake County*, 55 Ind. 194, wherein the county commissioners were held to have a *prima facie* right to purchase land for a home for the county poor. As to power of com-

be located at the county seat; but the location of the other buildings, and the situation of the other county real estate, rest in the discretion of the governing body of the county.<sup>78</sup> So, also, the amount of real estate necessary for each one of these purposes, and the sum to be paid therefor, lies in the discretion of the county board or court.<sup>79</sup> In case the county should contract to purchase land for other than public purposes, or to purchase an unreasonable quantity for public purposes, such purchase might be enjoined at the suit of the tax-payers as ultra vires, the county authorities having power to purchase only for public uses, and then only so much as is reasonably necessary.<sup>80</sup> Whenever it is necessary the county may also buy in real estate at execution, foreclosure, or tax

missioners of the county to lease premises or rent rooms for county purposes, see *Board of Com'rs of Norfolk County v. Cox*, 98 Va. 270, 36 S. E. 380; *Gardner v. Board of Dakota County Com'rs*, 21 Minn. 33. But see *Ford v. Mayor, etc., of City of New York*, 4 Hun (N. Y.) 587; *Stewart v. Otoe County*, 2 Neb. 177; *Thayer v. McGee*, 20 Mich. 195. As to employment of a physician for care of the county poor, see *Morgan County Com'rs v. Holman*, 34 Ind. 256; *Board of Com'rs of Perry County v. Lamax* (Ind. App.) 31 N. E. 584.

<sup>78</sup> *Board of Sup'r's of Culpeper County v. Gorrell*, 20 Grat. (Va.) 484; *Allen v. Lytle*, 114 Ga. 275, 40 S. E. 238.

<sup>79</sup> *Sheidley v. Lynch*, 95 Mo. 487, 8 S. W. 434; *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

<sup>80</sup> *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Colorado Paving Co. v. Murphy*, 78 Fed. 30, 23 C. C. A. 631, 37 L. R. A. 630; *Davenport v. Buffington*, 97 Fed. 237, 38 C. C. A. 453, 46 L. R. A. 377; *Burnett v. Abbott*, 51 Ind. 254. See, also, *Grannis v. Blue Earth County Com'rs*, 81 Minn. 55, 83 N. W. 495; *Wells v. Pontotoc County*, 102 U. S. 625, 26 L. Ed. 122; *Warren County Agricultural Joint Stock Co. v. Barr*, 55 Ind. 30; *Rothrock v. Carr*, 55 Ind. 334; *Hooper v. Ely*, 46 Mo. 505. As to the purchase of property at an excessive valuation, see *State v. Board of Chosen Freeholders*, 53 N. J. Law, 531, 22 Atl. 343. An injunction will also lie to restrain the payment of public money for a purpose wherein the commissioners are being misled or defrauded: *State ex rel. Fanning v. Cuyahoga County*, 9 Ohio S. & C. P. Dec. 76. But in *Scalf v. Collins County*, 80 Tex. 514, 16 S. W. 314, an attempt was made to have a conveyance of a homestead to the county set aside on the ground that it was not needed for county buildings or other county purposes. The conveyance was held good.

sale, for the purpose of saving debts due to it.<sup>81</sup> Property so purchased, unless redeemed, may be sold and transferred by the county, and a good title thereby conveyed.<sup>82</sup> This power is implied in favor of counties equally with other corporations, and for the same reasons.<sup>83</sup> A county may likewise receive and hold property conveyed to it, either by deed or devise in trust, for any public use within the scope of its powers.<sup>84</sup>

### *Construction of County Buildings*

The county board or court has likewise authority to contract for the construction of necessary county buildings and the furnishing thereof; and in the absence of statute directing the mode of contracting, as by plans, specifications, and competitive bidding, the method of negotiations and contracting is in the discretion of the governing body; and it has been held even, where the statute provides the method of negotiations and contracting, that the county board may in emergency depart from the statutory method.<sup>85</sup> The county board or court

<sup>81</sup> Cardwell v. Hargis, 24 Ky. Law Rep. 1406, 71 S. W. 488; Shepard v. Murray County, 33 Minn. 519, 24 N. W. 291; Audubon County v. American Immigrant County, 40 Iowa, 460.

<sup>82</sup> Shannon v. O'Boyle, 51 Ind. 565. "All civil corporations, \* \* \* unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had, an unlimited control over their respective properties, and may alienate in fee, or make what estates they please, for years, for life, or in tail, as fully as any individual may do with respect to his own property." 1 Kyd, Corp. 108.

<sup>83</sup> Clark, Priv. Corp. pp. 142-144; Page County v. American Immigrant County, 41 Iowa, 115; Linville v. Bohanan, 60 Mo. 554.

<sup>84</sup> Bell County v. Alexander, 22 Tex. 350, 73 Am. Dec. 268. In Jackson v. Hartwell, 8 Johns. (N. Y.) 422, it was decided that, while the supervisors of a county, who were made by statute a corporation for special purposes, might take by grant a parcel of land in trust that they might erect a courthouse and jail, these being county purposes, they could not be seised as trustees for the use of an individual, or in trust for building a church or schoolhouse for the use of the inhabitants of a particular town in the county. See 1 Dill. Mun. Corp. (4th Ed.) §§ 567-574.

<sup>85</sup> Board of Com'rs of Harrison County v. Byrne, 67 Ind. 21, where the contractor had abandoned the construction of the county build-

cannot delegate this power to contract for a public building to any other person or number of persons.<sup>86</sup> Actions upon claims for extras, swelling the price beyond the contract limit, have been repeatedly sustained in Indiana;<sup>87</sup> and in Dakota it has been decided that taxpayers of the county cannot enjoin the issuance of warrants in payment of work done in the erection of a courthouse under an unauthorized contract.<sup>88</sup> In the absence of statutory provision, the same general rules control contracts for the erection of any other necessary public buildings by the county.<sup>89</sup>

#### *Poor, Support of—Schools*

In many states the support of the poor is a town or township charge; but in the majority of them this duty is devolved upon the county. In these latter states the county authorities, in addition to purchasing land for a poorhouse and erecting the same, have power to contract for the necessary expense for the support of the poor, including food, clothing, and med-

ing, and the county commissioners were held to have the power to take up and finish the work without change of plans or specifications, or the letting of a new contract. See, also, *Board of Com'rs of Clinton County v. Hill*, 122 Ind. 215, 23 N. E. 779.

<sup>86</sup> *Russell v. Cage*, 66 Tex. 428, 1 S. W. 270. *Contra, Beck v. Puckett*, 2 Tenn. Cas. 490, in which the general statement is made that the county court may delegate to a committee its power to make a binding contract pertaining to any matter in which the court might bind the county.

<sup>87</sup> *Commissioners of Gibson County v. Cincinnati Steam-Heating Co.*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; *Board of Com'rs of Gibson County v. Motherwell Iron & Steel Co.*, 123 Ind. 364, 24 N. E. 115.

<sup>88</sup> *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586. See, also, *Ferriss v. Williamson*, 8 Baxt. (Tenn.) 424.

<sup>89</sup> *McDonough County v. Thomas*, 84 Ill. App. 408; *Bradford County v. Horton*, 6 Lack. Leg. N. (Pa.) 306; *Stuart v. Easton*, 170 U. S. 383, 18 Sup. Ct. 650, 42 L. Ed. 1078. See, also, *CLAIBORNE COUNTY v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, *Cooley*, Cas. Mun. Corp. 366; *Nelson v. Justices of Carter County*, 1 Cold. (Tenn.) 208; and *State ex rel. Ross v. Anderson County*, 8 Baxt. (Tenn.) 249, wherein it was held that the county cannot issue commercial paper.

ical attention.<sup>90</sup> In some cases necessaries have been provided in emergency without contract with the proper authority, but the person claiming compensation therefor must prove the necessity.<sup>91</sup> So, also, where schools of any kind are a county charge, it is competent for the county board to contract for the erection of necessary buildings, and for incurring other expenses necessary for the conduct of the schools.<sup>92</sup>

#### *Other Purposes*

Other functions are also devolved upon the county in several of the states, such as the care of roads, bridges, ferries, and other public concerns. For the necessary construction, maintenance, and repair of these utilities, it is competent for the county authorities to enter into contracts and incur liability on behalf of the county.<sup>93</sup> In general, it may be said

<sup>90</sup> King v. Sullivan County, 8 Baxt. (Tenn.) 329; Board of Com'rs of Morgan County v. Seaton, 90 Ind. 158; Board of Com'rs of Perry County v. Lamax (Ind. App.) 31 N. E. 584; Morgan County v. Seaton, 122 Ind. 521, 24 N. E. 213; Board of Com'rs of Orange County v. Ritter, 90 Ind. 362; Smith v. Shawnee County Commissioners, 21 Kan. 669.

<sup>91</sup> "The function of administering public charities is governmental, and township trustees are agents of the county for that purpose. This agency is created and defined by law, and consequently is of such a character that all are bound to take notice of its scope and limitations. Commissioners of Warren County v. Osburn, 4 Ind.

<sup>92</sup> Nashville & C. & St. L. R. Co. v. Franklin County, 5 Lea (Tenn.) 707; Shelby County v. Tennessee Centennial Exposition Co., 96 Tenn. 659, 36 S. W. 694, 33 L. R. A. 717; McCallie v. Mayor, etc., of Town of Chattanooga, 3 Head (Tenn.) 318; Luttrell v. Knox County, 89 Tenn. 253, 14 S. W. 802. The general statutes of Maryland provided that, where the state school fund was insufficient in any county, it was incumbent upon the county commissioners, on demand of the school board, to levy a pro rata tax not exceeding a certain amount on each \$100 for school purposes; and a special local statute provided that in Anne Arundel county there might be an additional levy, not exceeding a certain rate, for the purposes of a separate fund, both to be applied by the treasurer for school expenses. It was held that the county commissioners must apply the gross amount of tax levied to the school commissioners, and deductions for any other purpose, either as commissions or expenses of gathering the tax, could not be made. Board of County School Com'rs of Anne Arundel County v. Gantt, 73 Md. 521, 21 Atl. 548.

<sup>93</sup> Nashville & C. & St. L. R. Co. v. Franklin County, 5 Lea

that, wherever the county is endowed with a function or charged with a duty, the county authorities may make contracts, in their discretion, for the performance of such functions and discharge of such duties, to the end that the public weal and convenience may not suffer;<sup>94</sup> but all such contracts must be within the method and limits prescribed by statute, otherwise they are subject to be impeached as ultra vires acts.<sup>95</sup> But by all lawful contracts by the county board or court, within the scope of their authority, and for all emergent necessities for public uses supplied to the county and received by proper officers, a valid obligation is laid upon the county, which may be enforced by appropriate proceeding, and for the breach of which there is a remedy by action at law.<sup>96</sup>

(Tenn.) 707; Luttrell v. Knox County, 89 Tenn. 253, 14 S. W. 802; Beck v. Puckett, 2 Tenn. Cas. 490; Shelby County v. Tennessee Centennial Exposition Co., 96 Tenn. 666, 36 S. W. 694, 33 L. R. A. 717. See, also, Einseidler v. Whitman County, 22 Wash. 388, 60 Pac. 1122, and for powers of county over roads, Ledbetter v. Clarksville & R. Turnpike Co., 110 Tenn. 92, 73 S. W. 117.

<sup>94</sup> Kelly v. Multnomah County, 18 Or. 356, 22 Pac. 1110, in which the county was held liable for the cost of blankets furnished by the keeper of prisoners confined under criminal process in its jail, the statute making it the duty of the keeper to furnish and keep clean necessary bedding for such prisoners, and providing for the charges of safe-keeping and maintaining such prisoners to be paid from the county treasury. But see Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30; Wells v. Pontotoc County, 102 U. S. 625, 26 L. Ed. 122; Flagg v. Parish of St. Charles, 27 La. Ann. 319; Police Jury of Parish of Tensas v. Britton, 15 Wall. 566, 21 L. Ed. 251; Commonwealth v. Commissioners of Philadelphia County, 2 Serg. & R. (Pa.) 193; Jackson County v. Rendleman, 100 Ill. 379, 39 Am. Rep. 44; Henry v. Cohen, 66 Ala. 382; Lewis v. Board of Chosen Freeholders of Hudson County, 37 N. J. Law, 254.

<sup>95</sup> The county possesses no powers except such as are conferred expressly or by necessary implication, and these are strictly construed. Burnett v. Maloney, 97 Tenn. 712, 37 S. W. 689, 34 L. R. A. 541; CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; State ex rel. Sharpe v. Puckett, 7 Lea (Tenn.) 709; Colburn v. Chattanooga Western Railroad Co., 94 Tenn. 43, 28 S. W. 298; Louisville & N. R. Co. v. Davidson County Court, 1 Snead (Tenn.) 637, 62 Am. Dec. 424.

<sup>96</sup> Gibson County v. Rains, 11 Lea (Tenn.) 20; Taylor v. Mayor, etc., of City of New York, 82 N. Y. 10; Adams v. Tyler, 121 Mass.

## TORTS

173. A county, in the exercise of the governmental functions delegated to it by the state, is not liable for corporate neglect, nor for the misfeasance or negligence of its officers or agents.

As we have already seen,<sup>97</sup> counties are but subdivisions of the state, erected solely for the exercise of governmental authority; and it would be as proper to hold the state as the county liable for the wrongful acts of its officers.<sup>98</sup> But the sovereign is not liable to action by the citizen unless it chooses to make itself so. Unless, therefore, the state gives a right of action by statute against a county for the nonfeasance or misfeasance of its officers, no such action can be brought.<sup>99</sup> "No suit can be maintained against the county upon the principle of respondeat superior, because the relation of master and servant does not exist. County officers are quasi public officers of the state."<sup>1</sup>

380; Commissioners of Roads and Revenues for Floyd County v. Hurd, 49 Ga. 462, 15 Am. Rep. 682. See People ex rel. Lawrence v. Board of Supervisors of Clark County, 50 Ill. 213; Murphy v. Steele County Commissioners, 14 Minn. 67 (Gil. 51); Klein v. Board of Supervisors of Warren County, 51 Miss. 878. As to when mandamus is a proper remedy, see Commissioners' Court v. Moore, 53 Ala. 25.

<sup>97</sup> Ante, § 166.

<sup>98</sup> Wood v. Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561; Nashville & K. R. Co. v. Wilson County, 89 Tenn. 597, 15 S. W. 446; Hawkins v. Trousdale County Justices, 12 Lea (Tenn.) 356; Hollenbeck v. Winnebago County, 95 Ill. 151, 35 Am. Rep. 151.

<sup>99</sup> Barbour County v. Horn, 48 Ala. 649; MARKEY v. QUEENS COUNTY, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46, Cooley, Cas. Mun. Corp., 357; 1 Beach, Pub. Corp. pp. 744-746.

<sup>1</sup> FRY v. ALBEMARLE COUNTY, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879, Cooley, Cas. Mun. Corp. 363. See, also, Dougherty County v. Kemp, 55 Ga. 252.

## POWER OF EMINENT DOMAIN

**174.** Counties may exercise the sovereign power of eminent domain in taking property for public use, without the consent of the owner, on making due compensation therefor.

The power of eminent domain has been declared by the courts to be "a necessary and inherent attribute of sovereignty in the state, which does not depend upon constitutional provisions for its existence."<sup>2</sup> The county, being an agency of the state to execute the sovereign will and administer public affairs in a part of its territory, must necessarily possess and exercise this power wherein it is charged with public duties. Thus it has been authorized to take private property for the purpose of making public highways, establishing ferries, taking lands for public buildings, and other like works of public necessity.<sup>3</sup>

### *Delegation*

This sovereign power exists primarily, of course, in the legislature.<sup>4</sup> But the Legislature may in its discretion exercise

<sup>2</sup> *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; *People v. Mayor, etc., of City of New York*, 32 Barb. (N. Y.) 102; *Raleigh & G. R. Co. v. Davis*, 19 N. C. 451; *Noll v. Dubuque, B. & M. Railroad Co.*, 32 Iowa, 66; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389. For the distinction between eminent domain and police power, see *City of Philadelphia v. Scott*, 81 Pa. 80, 22 Am. Rep. 738; *Hine v. City of New Haven*, 40 Conn. 478; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349. See, also, Lewis, *Em. Dom.* §§ 1, 8.

<sup>3</sup> *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333; *Inhabitants of Wayland v. Middlesex County Commissioners*, 4 Gray (Mass.) 500; *Culpeper County Sup'r's v. Gorrell*, 20 Grat. (Va.) 484.

<sup>4</sup> *Beekman v. Saratoga & S. Railroad Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *De Varaigne v. Fox*, 2 Blatchf. (U. S.) 95, Fed. Cas. No. 3,836. But see *In re New York Cent. R. Co.*, 66 N. Y. 407.

this power through a public corporation.<sup>5</sup> This power is commonly delegated by statute; expressing the purposes for which it may be exercised, and the mode and manner of exercising it, which statute may be either special or general.<sup>6</sup> But where the county is charged with the performance of public duties, and invested with general powers of performance of acts necessary therefor, the right to acquire land by eminent domain has been held to be an incidental power necessarily implied therefrom.<sup>7</sup> But such power will be implied only for obvious public purposes, and in cases of plain necessity.<sup>8</sup>

### POLICE POWER

175. In many states, counties, as important agencies for the public welfare, are clothed with a limited measure of police power for the public health and safety of the locality.

The police power may justly be regarded in America as the supreme exercise of sovereignty. Under it the government may, for the protection of the public, summarily destroy private property without compensation, and with impunity.<sup>9</sup>

<sup>5</sup> Mercer v. Pittsburgh, Ft. W. & C. Railroad Co., 36 Pa. 99; Weir v. St. Paul, S. & T. F. Railroad Co., 18 Minn. 155 (Gil. 139); West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; Harbeck v. City of Toledo, 11 Ohio St. 219; Eastern R. Co. v. Boston & M. Railroad Co., 111 Mass. 125, 15 Am. Rep. 13; Patterson v. Mississippi & R. R. Boom Co., 3 Dill. (U. S.) 465, Fed. Cas. No. 10,829; City of East St. Louis v. St. John, 47 Ill. 463; Barrington v. Neuse River Ferry Co., 69 N. C. 165; Reddall v. Bryan, 14 Md. 444, 74 Am. Rep. 550; Johnson v. Utica Water Works Co., 67 Barb. 415.

<sup>6</sup> Buffalo & N. Y. C. R. Co. v. Brainard, 9 N. Y. 100.

<sup>7</sup> Culpeper County Suprs v. Gorrell, 20 Grat. (Va.) 484.

<sup>8</sup> 1 Beach, Pub. Corp. § 665; Boone, Corp. §§ 92, 93.

<sup>9</sup> "The destruction of infected trees by order of a public official, after due inspection, is a remedy which, however severe, is appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as well as without any compensation to the owner for resulting loss." Baldwin, J., in State

This power is inherent in the state, and may be delegated to public corporations.<sup>10</sup> It is usually exercised by state officials, or delegated to municipalities, where dense population requires its most frequent exercise. But county governments are often clothed by express statute with police power to protect the public health and private property. In cities this power extends to a variety of objects, including the regulation of occupations and amusements, of wharves and markets, and other lawful business, the prohibition of liquor shops and houses of ill fame, and the prevention of fires, and generally the abatement of nuisances.<sup>11</sup>

#### *Limited Scope*

The power is conferred upon counties usually for the purpose of preventing the spread of contagious and infectious diseases, either among people or cattle, thereby preserving the public health and the property of the locality; and where granted by valid statute, there can be no doubt of the lawful possession of the power by the county.<sup>12</sup> Contrary opinions

v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253; Dunbar v. City Council of Augusta, 90 Ga. 390, 17 S. E. 907; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); Cooley, Const. Lim. (4th Ed.) 746; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

<sup>10</sup> Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; Pratt v. Borough of Litchfield, 62 Conn. 112, 25 Atl. 461.

<sup>11</sup> Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Ogden City v. McLaughlin, 5 Utah, 387, 16 Pac. 721; Odell v. City of Atlanta, 97 Ga. 670, 25 S. E. 173; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; Robinson v. Mayor, etc., of Town of Franklin, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625; Wartman v. City of Philadelphia, 33 Pa. 203.

<sup>12</sup> City of Clinton v. Clinton County, 61 Iowa, 205, 16 N. W. 87; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. Rep. 525. In California county commissioners are given

have been expressed by the courts of different states as to the power of the Legislature to devolve upon counties medical treatment of indigent inebriates, such a statute being held valid in Maryland and void in Wisconsin.<sup>13</sup> But there seems to be general assent to the doctrine that statutes are valid which are calculated to preserve the public health and prevent the spread of disease, which may destroy not only people, but also animals and vegetation. In short, saving of life, whether animal or vegetable, is a lawful purpose of government; and the police power is appropriate and lawful whenever it preserves and protects the public against epidemic.<sup>14</sup>

"Counties are clothed, just as states and commonwealths are, with certain police powers which are not the creatures of legislation, and cannot wait upon legislation, but must be asserted just as the exigencies of the county demand, but always for public purposes, and within the scope and objects of their organization."<sup>15</sup> Such paramount police power can, of course, be implied in favor of a county only in case of great emergency, where the state has failed to provide adequate sanitary means for the public protection. In such exigencies the reasonable exercise of appropriate sanitary meas-

power to license and regulate occupations. *Los Angeles County v. Eikenberry*, 131 Cal. 461, 63 Pac. 766.

<sup>13</sup> *City of Baltimore v. Keeley Institute*, 81 Md. 106, 31 Atl. 437, 27 L. R. A. 647; *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105. The latter opinion is based upon the idea that this was not a public purpose nor a public act.

<sup>14</sup> *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394; *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 130; *City of St. Paul v. Byrnes*, 38 Minn. 176, 36 N. W. 449; *Beiling v. City of Evansville*, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73; *Thomas v. Town of Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727; *Hale v. Houghton*, 8 Mich. 458; *State v. Wordin*, 56 Conn. 216, 14 Atl. 801; *Smith v. City of Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

<sup>15</sup> *Beck v. Puckett*, 2 Tenn. Cas. 496.

ures by the county authorities finds judicial approval in our courts.<sup>16</sup> *Salus populi est suprema lex.*

<sup>16</sup> The act challenged in this case was a contract made by a county court with a private person to transcribe and rebind the registration books of the county, which had been so charred and injured in a fire as to make this work indispensable to the consulting of the county records by the public. Sneed, J., in delivering the opinion of the court, sustaining the exercise of this power by the county officials, says: "The principle upon which these police powers are exercised is the safety and welfare of the people, a sort of *jus excelsior*, that cannot wait upon delay. '*Salus populi est suprema lex.*' A necessity which Lord Coke says makes that lawful which seemeth unlawful. 8 Coke, 68. The law, says Sir Matthew Hale, of a particular time and place. Hale, P. C. 54. A necessity, says Hobart, that even overcomes the law, and defends what it compels. Hob. 144. In times of exigency, such powers have been exercised by public corporations from immemorial times, and are justified as the necessary incidents of corporate entity."

## CHAPTER XVII

### QUASI CORPORATIONS—COUNTIES (Continued)

176. County Liabilities.
177. Contracts—Subject-Matter.
178. Forms of Contracts.
179. Borrowing Money.
180. County Bonds.
181. Fiscal Management.
182. Taxation.
183. Same—Legislative Control.

### COUNTY LIABILITIES

**176. Counties**, being involuntary civil divisions of the state, created as governmental agencies for purely public purposes, partake of the state's exemption from liability, and can be sued only when that immunity has been waived by the state for the county.

The favorite maxim of the common law that there is no wrong without its remedy, is not applicable to counties.<sup>1</sup> By another maxim the sovereign was exempt from suit. And so with us the state can only be sued by its express consent; and counties, being merely parts of the state, partake of that immunity.<sup>2</sup> The law exempting the sovereign, rather than the

<sup>1</sup> *Gallia County Com'r v. Holcomb*, 7 Ohio, 232, pt. 1; *FRY v. ALBEMARLE COUNTY*, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879; *Cooley, Cas. Mun. Corp.* 363; *White v. Commissioners of Chowan*, 90 N. C. 439, 47 Am. Rep. 534; *Brabham v. Board of Sup'r's of Hinds County*, 54 Miss. 363, 28 Am. Rep. 352; *Monroe County v. Flynt*, 80 Ga. 489, 6 S. E. 173; *Schuyler County v. Mercer County*, 9 Ill. (4 Gilman) 20; *Ward v. Hartford County*, 12 Conn. 404; *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *Lyell v. St. Clair County*, 3 McLean, 580, Fed. Cas. No. 8,621.

<sup>2</sup> *Watkins v. Walker County*, 18 Tex. 585, 70 Am. Dec. 298; *Wood v. Tipton County*, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561; *Bailey v. Lawrence County*, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881;

law making the subject liable, is the fundamental law applicable to counties.<sup>3</sup> Hence, as we have seen,<sup>4</sup> the county is exempt from liability for the misfeasance or malfeasance of its officers, unless suit is expressly given by statute therefor. The same general rule prevails also in regard to contracts. Counties, being created by statute, and receiving all their powers therefrom, are subject only to such liabilities as are imposed by statute with respect to their powers and functions.<sup>5</sup> Possessing no powers except such as are conferred expressly or by necessary implication, their liabilities are strictly correlative. There is no liability resting upon the county, and

*Commonwealth v. Commissioners of Huntingdon County*, 3 Rawle (Pa.) 487; *Wolcott v. Lawrence County*, 26 Mo. 272; *Raymond v. Stearns County Com'rs*, 18 Minn. 60 (GIL. 40); *Emerson v. Inhabitants of Washington County*, 9 Me. (9 Greenl.) 88; *Heller v. Board of Com'rs of Shawnee County*, 23 Kan. 128; *James v. Conecuh County*, 79 Ala. 304; *Brewster County v. Presidio County*, 19 Tex. Civ. App. 638, 48 S. W. 218.

<sup>3</sup> *Burnett v. Maloney*, 97 Tenn. 712, 37 S. W. 689, 34 L. R. A. 541; *Harvey v. Tama County*, 46 Iowa, 522; *Moon v. Board of Com'rs of Howard County*, 97 Ind. 176; *Granger v. Pulaski County*, 26 Ark. 37; *Madden v. Lancaster County*, 65 Fed. 191, 12 C. C. A. 566; *Eastman v. Clackamas County* (C. C.) 32 Fed. 24; *Ayers v. Thurston County*, 63 Neb. 96, 88 N. W. 178; *Board of Com'rs of Greer County v. Watson*, 7 Okl. 174, 54 Pac. 441.

<sup>4</sup> Ante, § 173.

<sup>5</sup> *Board of Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668; *Saline County v. Wilson*, 61 Mo. 237; *Brainard v. Kings County*, 84 Hun, 290, 32 N. Y. Supp. 311; *Davis v. Board of Sup'r's of Ontonagon County*, 64 Mich. 404, 31 N. W. 405; *Morrison v. Board of Com'rs of Decatur County*, 16 Ind. App. 317, 44 N. E. 65, 1012; *Keller v. Hyde*, 20 Cal. 594; *Pacific Bridge Co. v. Clackamas County* (C. C.) 45 Fed. 217. A county is not liable for damages caused by the negligent construction of a ditch by its officers or agents, unless liability is expressly or by necessary implication imposed by statute. *Floria v. Galveston County* (Tex. Civ. App.) 55 S. W. 540. Nor for damages caused by a mob, though resulting from torts of its officers. See *Board of Chosen Freeholders of Sussex County v. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530; *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Talbot County Com'rs v. Queen Anne's County Com'rs*, 50 Md. 245; *Ward v. Hartford County*, 12 Conn. 404; *Sopér v. Henry County*, 26 Iowa, 264. Also *Crause v. Harris County*, 18 Tex. Civ. App. 375, 44 S. W. 616.

no right of action against it, except by statutory expression or necessary implication;<sup>6</sup> and, with regard to this liability and action based upon statute, the tendency of the court is to apply the rules of strict construction.<sup>7</sup>

### *Strict Construction.*

This rule and practice of courts is the key of numerous decisions against the validity of claims against counties. Their dominant tone is the protection of the public, and this is lowered only by some prevailing equity. It pervades decisions on all classes of county claims, including bonds as well as warrants and accounts. The maxims of the law of agency are rigidly applied. The public is the principal, speaking through the legislature, restrained only by constitutional limitations. The county is the agent of the state, solely for public purposes.<sup>8</sup> The statute is the power of attorney or letter of au-

<sup>6</sup> *Wiegel v. Pulaski County*, 61 Ark. 74, 32 S. W. 116; *Lancaster County v. Fulton*, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436; *Borough of Henderson v. Sibley County*, 28 Minn. 515, 11 N. W. 91; *Allegheny County v. Parrish*, 93 Va. 615, 25 S. E. 882; *Byrne v. East Carroll Parish*, 45 La. Ann. 392, 12 South. 521; *Lebcher v. Board of Com'rs of Custer County*, 9 Mont. 315, 23 Pac. 713; *Board of Cass County Com'rs v. Ross*, 46 Ind. 404; *Floria v. Galveston County* (Tex. Civ. App.) 55 S. W. 545.

Counties have been invested with express powers only of limited extent, and in all other matters, including the conservation of highways and bridges, being mere divisions organized for the convenient exercise of portions of the political power of the state, are not liable for injuries suffered through their agents in discharging their duties, unless expressly made liable by statute. *MARKEY v. QUEENS COUNTY*, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46, Cooley, Cas. Mun. Corp. 357. See, also, as to county liability for defective bridge, *Board of Com'rs of Jasper County v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *Montgomery County Com'rs v. Coffenberry*, 14 Ind. App. 701, 42 N. E. 491.

<sup>7</sup> *Richardson v. Grant County* (C. C.) 27 Fed. 495; *Hight v. Board of Com'rs of Monroe County*, 68 Ind. 575; *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87; *State ex rel. Treadwell v. Commissioners of Hancock County*, 11 Ohio St. 183.

<sup>8</sup> *Savage v. Bangor*, 40 Me. 176, 63 Am. Dec. 658; *Browning v. City of Springfield*, 17 Ill. 143, 63 Am. Dec. 345; *Highway Com'rs of Niles Tp. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; *Lorillard v. Town*

thority—in some instances the note of instructions. This is public, and every one dealing with the county must take notice of its terms and provisions. It is the only warrant of authority to the agent. Outside of it the county has no power to bind the public. The county officials or boards can act as agents only within its limits. Beyond these their agency ceases, and their acts and contracts are void.<sup>9</sup> Whoever recognizes their assumptions and pretensions of public agency outside of the statutes, and there seeks by contract with them to bind the public to obligations and expose it to liability, does so at his own peril. The courts protect the public against such efforts by a strict construction of the law. The decisions are far from harmonious in all particulars, and some of them seem to ignore this cardinal doctrine and underlying theory in the results attained. But none of the courts have avowed a conflicting rule of decision, and the relation of public agency and the rule of strict construction must be regarded as the settled law of the land with regard to the contractual liability of counties.<sup>10</sup>

of Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302.

"A county is but an agent of the state, and therefore not liable for interest under general provisions of a statute for payment of interest, but only where it contracts for interest, or is required by a statute to pay the same." Seton v. Hoyt, 34 Or. 266, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634.

It was held in the case of Board of Com'rs of Buncombe County v. Payne, 123 N. C. 432, 31 S. E. 711, that the payment of interest on the bonds of a county does not estop the county to deny their validity. See, also, Hughes v. Monroe County, 79 Hun, 120, 29 N. Y. Supp. 495.

<sup>9</sup> Board of Orange County Com'rs v. Ritter, 90 Ind. 362; Smith v. Board of Sup'r's of Barrow County, 44 Wis. 686; Stamp v. Cass County, 47 Mich. 330, 11 N. W. 183; Dennison v. St. Louis County, 33 Mo. 168.

One contracting with county commissioners is charged with knowledge of the limits of their authority. Lebcher v. Board of Com'rs of Custer County, 9 Mont. 315, 23 Pac. 713.

<sup>10</sup> Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Hill v. Memphis, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed.

**CONTRACTS—SUBJECT-MATTER**

177. To create contractual obligation on the part of the county, and render it legally liable for indebtedness of any kind, the following elements are usually declared by the courts as essential requisites:

- (1) There must be a valid statute or statutes empowering the county to contract in regard to the subject-matter of the undertaking.
- (2) The contract must be confined within the limitations of this statutory authority with reference both to the public objects included in it, and the amount of consideration to be paid therefor.
- (3) Any condition precedent involving popular consent or approval must be strictly performed or complied with.
- (4) The contract must be made on the part of the county by the board or officers thereunto appointed by law, and substantially in the mode prescribed by the statute.

The source of contractual powers in a county may be found either in the state Constitution, or in general statutes, or in special laws. When not expressly conferred by these or any of them, authority is often held to exist under the doctrine of implied powers.<sup>11</sup> But cases are rare in which such implica-

887; Rayburn v. Davis, 2 Ill. App. 548; Murphy v. Napa County, 20 Cal. 497; Richardson v. Grant County (C. C.) 27 Fed. 495; Board of Shawnee County Com'rs v. Carter, 2 Kan. 115. In two Illinois cases it has been declared by the Supreme Court of that state that it will not imply power in a county to donate money or land to a railroad company from a grant of power to it to subscribe for stock in such company. Choisser v. People ex rel. Rude, 140 Ill. 21, 29 N. E. 546; Sampson v. People ex rel. Rich, 140 Ill. 466, 30 N. E. 689. A county has no power to execute a deed with covenants of warranty, no statute conferring such power, and it cannot be implied. Harrison v. Palo Alto County, 104 Iowa, 383, 73 N. W. 872.

<sup>11</sup> Woods v. Board of Sup'r's of Madison County, 136 N. Y. 411, 32

tion is made by the courts in regard to subject-matter. If this cannot be found expressed in special law, or designated in some enumeration of powers, or included within the scope of a general grant of authority to counties, then the contract is beyond the scope of the county's agency, and is therefore void.<sup>12</sup> In these cases the courts apply the maxim, "Expressio unius exclusio alterius," and, in favor of the public, presume against the threatened liability.

#### *Limitations as to Objects and Amount*

In determining the validity of claims against it, the next question for consideration is whether the county has confined its contract to objects appropriate to the subject-matter, and to the amount authorized to be expended for that purpose. Ordinarily counties may not incur an annual indebtedness in excess of annual revenue. Public contracts require appropriations, and appropriations require public funds, and the annual expense of the county under general laws must be limited to the annual resources. When special expenditures are to be made for extraordinary purposes, they must be provided for either by an additional tax levy, or by authorized corporate indebtedness, usually in the form of bonds. The amount of this indebtedness is generally fixed in the statute, and this is the limit of the authority of the county. Any contract binding the county to a greater expenditure is void, either in whole, or as to the excess above the statutory limit.<sup>13</sup>

N. E. 1011; Salt Lake County v. Golding, 2 Utah, 319; Levy Court v. The Coroner, 2 Wall. (U. S.) 501, 17 L. Ed. 851; Grant County v. Lake County, 17 Or. 453, 21 Pac. 447.

<sup>12</sup> Cooley, *Const. Lim.* (6th Ed.) p. 461; Dill. *Mun. Corp.* § 457. Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Driftwood Val. Turnpike Co. v. Board of Com'rs of Bartholomew County, 72 Ind. 226; Maupin v. Franklin County, 67 Mo. 327; Clark v. Polk County, 19 Iowa, 248; Estep v. Keokuk County, 18 Iowa, 199; Board of Tippecanoe County Com'rs v. Cox, 6 Ind. 408; Nashville v. Sutherland, 92 Tenn. 335, 21 S. W. 674, 19 L. R. A. 619, 36 Am. St. Rep. 88; Pugh v. City of Little Rock, 35 Ark. 75; Cowdrey v. Town of Caneadea (C. C.) 16 Fed. 532; City of Eufaula v. McNab, 67 Ala. 588, 42 Am. Rep. 118.

<sup>13</sup> King v. Mahaska County, 75 Iowa, 329, 39 N. W. 636; Dixon

The latter ruling has been made in some cases where the contract was severable. So, also, the contract may embrace with lawful subject-matter other objects not included in the statutory authority, in which case the contract will be void as to all matters dehors the statute; and, unless they are severable from the valid portion of the contract, it will be entirely void.<sup>14</sup>

#### *Extraordinary Expenditures—Popular Assent Thereto*

Extraordinary expenditures, such as the removal of a county seat, involving the construction of new county buildings, the erection of some large public improvement by the county, and especially the subscription of a county subsidy to promote the construction or completion of a railroad, canal, or other public work undertaken by private companies, are rarely, if ever, permitted without popular consent expressed at the ballot box. Full and strict compliance with such a condition precedent is a sine qua non to a valid contract upon this subject. The public election must be duly held at the prescribed time throughout the county by the proper officers, and lawful return made, showing the statutory majority required, before the county officers are authorized to bind the county to any expenditure upon the subject.<sup>15</sup> The courts evince no disposition to liberalize the rules of strict construction in this particular. The rule is so inflexible in such case that no tax

County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Daviess County v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; Lake County v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065. A county by receiving benefits, is not estopped to assert the invalidity of warrants issued in excess of the constitutional limit of indebtedness. Municipal Security Co. v. Baker County, 39 Or. 396, 65 Pac. 369.

<sup>14</sup> People v. May, 9 Colo. 404, 12 Pac. 838; Hunt v. Fawcett, 8 Wash. 396, 36 Pac. 318.

<sup>15</sup> Nelson v. Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Hobart v. Butte County Sup'r's, 17 Cal. 23; Crooke v. Board of Com'r's of Daviess County, 36 Ind. 320; Colburn v. Chattanooga Western R. Co., 94 Tenn. 43, 28 S. W. 298; Allen v. Cerro Gordo County, 34 Iowa, 54; Lewis v. Lofley, 92 Ga. 804, 19 S. E. 57; Dyer v. Erwin, 106 Ga. 845, 33 S. E. 63.

can be imposed or liability incurred without the consent of the taxpayers. If the legislature requires this as a condition precedent to a contract, the mandate is imperative, and non-compliance with it avoids all contracts based upon it.<sup>16</sup>

#### *County Liabilities Incurred upon Whose Authority*

All county liabilities not specially prescribed by law arise in consequence of the act of some board or officer authorized to represent the county and incur the liability. This liability may be contracted by the county board under general authority, or by a committee thereunto lawfully appointed by it, or by some officer duly authorized by statute. In some instances the course of action to be taken by the constituted authority to incur the liability is prescribed by the statute. The general rule of law is that that particular board or officer of the county empowered to do the act or make the contract alone has power to make the county liable.<sup>17</sup> No other can assume the power and responsibility; he would be a mere volunteer, and could not bind the county by his acts. The method of official action is sometimes so prescribed by the statute as to become material to the contract. In such case the law must be substantially pursued, or the contract will not be binding;<sup>18</sup> as, for

<sup>16</sup> *Reichard v. Warren County*, 31 Iowa, 381; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186; *State, to Use of Neal, v. Saline County Court*, 48 Mo. 390, 8 Am. Rep. 108. In *Black v. Board of Com'rs of Buncombe County*, 129 N. C. 121, 39 S. E. 818, it was ruled that a tax levy for building a courthouse was not such extraordinary expense, within the meaning of the Constitution, as to require its submission to popular vote. But see *Dyer v. Erwin*, 106 Ga. 845, 33 S. E. 63, where, on full and exhaustive examination, the conclusion was reached as stated in the text. See, also, *Locke v. Davison*, 111 Ill. 19.

<sup>17</sup> *Simmes v. Chicot County*, 50 Ark. 566, 9 S. W. 308; *Tatlock v. Louisa County*, 46 Iowa, 138; *Davis v. Linn County*, 24 Iowa, 508; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005; *MERCHANTS' EXCHANGE NAT. BANK v. BERGEN COUNTY*, 115 U. S. 348, 6 Sup. Ct. 88, 29 L. Ed. 430; *BROWN v. BON HOMME COUNTY*, 1 S. D. 216, 46 N. W. 173; *Cooley, Cas. Mun. Corp.* 372; *Chisholm v. Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686.

<sup>18</sup> *State ex rel. Reed v. Marion County Com'rs*, 21 Kan. 419; *Bentley v. Board of Com'rs of Chisago County*, 25 Minn. 259; *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127, 2 L. Ed. 229; wherein Mar-

instance, if the statute prescribes that the contract shall be in writing, and shall be signed by specified officers, no action could be maintained upon an oral contract made by the designated officers, or written contract signed by other officers, though it be otherwise authorized by law.<sup>19</sup>

#### *Illustrations*

Thus where the chairman of the board of supervisors, who was also ex officio chairman of the building committee, contracted with the plaintiffs for materials for a jail upon the credit of the county, but without express authority from the supervisors or the building committee, the court refused to infer the authority of the chairman in the premises, and held the contract void;<sup>20</sup> and it was held in the same case that a statement by the chairman of the county board, made to the claimant in open session and without objection, that the board could not pay the bill that day, but would do so as soon as the work was accepted, did not constitute a contract binding as an obligation upon the county. And where a county tax collector employed an attorney to represent the interests of the county, the contract was held void, because that

shall, C. J., declared: "When the law prescribes to the corporation a mode of contracting, it must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." See, also, *Agawam Nat. Bank v. Inhabitants of South Hadley*, 128 Mass. 503.

<sup>19</sup> *Hasbrouck v. City of Milwaukee*, 21 Wis. 217; *City of Sacramento v. Kirk*, 7 Cal. 419; *Bonesteel v. Mayor, etc., of City of New York*, 22 N. Y. 162; *O'Hara v. City of New Orleans*, 30 La. Ann. 152; *Hague v. City of Philadelphia*, 48 Pa. 527; *Starkey v. City of Minneapolis*, 19 Minn. 203 (*Gil.* 166); *Lebcher v. Board of Com'rs of Custer County*, 9 Mont. 315, 23 Pac. 713.

But the ancient formalities in regard to corporation contracts are not now observed or required, even in case of public corporations. *Fanning v. Gregoire*, 16 How. (U. S.) 524, 14 L. Ed. 1043; *Mayor, etc., of City of Chattanooga v. Geiler*, 13 Lea (Tenn.) 611; *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Bellmeyer v. Independent Dist. of Marshalltown*, 44 Iowa, 564; *City of Alton v. Muledy*, 21 Ill. 76; *Montgomery County v. Barber*, 45 Ala. 237.

<sup>20</sup> *Rice v. Plymouth County*, 43 Iowa, 136.

power was vested alone in the county court.<sup>21</sup> So, also, it has been held in Indiana that a promise made by county commissioners to pay extra compensation for extra work by a contractor on a "free gravel road" was not binding upon the county, because the statute had imposed the expense of constructing these roads upon the landowners.<sup>22</sup> In Pennsylvania it has been decided that a county is not liable to an innkeeper for board and lodging of militia called out by the sheriff to quell a riot and keep the peace, but that the innkeeper must look to the sheriff personally.<sup>23</sup> In regard to attorneys, it has also been held that the county is not liable for one appointed by the court to represent the prosecution in the absence of the county attorney;<sup>24</sup> nor when retained by the district attorney to assist him in a state case;<sup>25</sup> nor one appointed by a justice of the peace;<sup>26</sup> nor for a special attorney to represent the county when there is a regular county attorney;<sup>27</sup> nor for one assisting in the prosecution of a state case, even when retained by the county commissioners.<sup>28</sup>

#### *Implied Contracts*

On the other hand, a county has been held liable in an action of assumpsit for the value of property or services of a person received and appropriated by it, in the absence of any express contract. In such cases, of course, knowledge of the facts must be brought home in due season to the county board in order to fasten liability upon the county.<sup>29</sup> But the law will

<sup>21</sup> Simmes v. Chicot County, 50 Ark. 566, 9 S. W. 308.

<sup>22</sup> Little v. Board of Com'rs of Hamilton County, 7 Ind. App. 118, 34 N. E. 499.

<sup>23</sup> Raush v. Ward, 44 Pa. 389.

<sup>24</sup> Miller v. Buena Vista Co., 68 Iowa, 711, 28 N. W. 31.

<sup>25</sup> Tatlock v. Louisa County, 46 Iowa, 138.

<sup>26</sup> Davis v. Linn County, 24 Iowa, 508.

<sup>27</sup> Brome v. Cuming County, 31 Neb. 362, 47 N. W. 1050.

<sup>28</sup> Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Modoc County v. Spencer, 103 Cal. 498, 37 Pac. 483.

<sup>29</sup> Madison County v. Gibbs, 9 Lea (Tenn.) 383; Butler v. Board of Com'rs of Neosho County, 15 Kan. 178; Brady v. Supervisors of City and County of New York, 10 N. Y. 260; Montgomery County v. Barber, 45 Ala. 237.

not imply a contract in conflict with an express contract,<sup>30</sup> nor where an express contract is forbidden.<sup>31</sup> An action will also lie against a county for money had and received under an ultra vires contract, provided the money was applied to a lawful county purpose.<sup>32</sup>

### FORMS OF CONTRACTS

178. If the form of contract, or mode of executing the same, be not prescribed by statute, the contracts of counties may be made in the same way as those of other corporations, and may be either in writing or by parol.

Important county contracts, requiring the exercise of discretion, must, of course, be made by the governing board of the county, whether it be court, commissioners, supervisors, freeholders, or police juries. Such boards are required to keep a record of their proceedings and it has been held that their ac-

<sup>30</sup> Emerson v. Inhabitants of Washington County, 9 Me. (9 Greenl.) 95; Young v. Iberville Parish, 22 La. Ann. 87.

<sup>31</sup> Hovey v. Board of Com'rs of Wyandotte County, 56 Kan. 577, 44 Pac. 17; Richardson v. Grant County (C. C.) 27 Fed. 495; Argenti v. City of San Francisco, 16 Cal. 255; McDonald v. Mayor, etc., of City of New York, 68 N. Y. 23, 23 Am. Rep. 144; Burrill v. Boston, 2 Cliff. 590, Fed. Cas. No. 2,198; The Collector v. Hubbard, 12 Wall. (U. S.) 1, 20 L. Ed. 272; Murphy v. City of Louisville, 9 Bush (Ky.) 189; Curtis v. Fiedler, 2 Black (U. S.) 478, 17 L. Ed. 273; Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453; Paul v. City of Kenosha, 22 Wis. 266, 94 Am. Rep. 598.

<sup>32</sup> Peed v. McCrary, 94 Ga. 487, 21 S. E. 232; Borough of Henderson v. Sibley County, 28 Minn. 515, 11 N. W. 91; Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Waitz v. Ormsby County, 1 Nev. 370; Dowell v. City of Portland, 13 Or. 248, 10 Pac. 308; ALLEN v. INTENDANT & COUNCILMEN OF CITY OF LA FAYETTE, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497, Cooley, Cas. Mun. Corp. 303; Chapman v. Douglas County, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; Morton v. City of Nevada (C. C.) 41 Fed. 582.

tion as a board can be proven only by the record.<sup>33</sup> In other cases proof has been admitted of the oral declarations of the chairman made in open session to the contractor.<sup>34</sup> The question of the contract is thus made to turn upon the rules of evidence. The rule enforced in the courts seems to be that strict proof will be required of persons suing the county upon a contract wholly executory.<sup>35</sup> But if under a contract informally made, the county has received the benefits contracted for, either in property or services, and the matter is within the scope of the county's authority, formal proof will not be required; thus following the rule applied to private corporations.<sup>36</sup>

<sup>33</sup> Rich v. Town of Mentz, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. Ed. 1074; Cowdrey v. Town of Caneadea (C. C.) 16 Fed. 532; Crump v. Board of Sup'rs of Colfax County, 52 Miss. 107; People v. Board of Sup'rs of Fulton County, 14 Barb. (N. Y.) 56. But the contrary rule is the prevailing one. United States Bank v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Wayne County v. City of Detroit, 17 Mich. 390; Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. Ed. 351; Gassett v. Town of Andover, 21 Vt. 342.

In Kentucky it has been held that where bodies like the county court have judicial powers, and also large administrative and executive powers, and are by law empowered to employ agents in the execution of the latter branch of powers, the acts of the agents are not in every case required to appear of record.

<sup>34</sup> Rice v. Plymouth County, 43 Iowa, 136; Curtis v. Cass County, 49 Iowa, 421. See Gordon v. Denton County (Tex. Civ. App.) 48 S. W. 737.

<sup>35</sup> Starkey v. City of Minneapolis, 19 Minn. 203 (Gil. 166); Gilbert v. City of New Haven, 40 Conn. 102; Board of Huntington County Com'rs v. Boyle, 9 Ind. 296.

<sup>36</sup> Dowell v. City of Portland, 13 Or. 248, 10 Pac. 308; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; State Board of Education v. City of Aberdeen, 56 Miss. 518; Wayne County v. City of Detroit, 17 Mich. 390; Inhabitants of Adams v. Farnsworth, 15 Gray (Mass.) 423; Taylor v. Lambertville, 43 N. J. Eq. 107, 10 Atl. 809; Dauphin County v. Bridenhart, 16 Pa. 458; Ring v. Johnson County, 6 Iowa, 265; Montgomery County v. Barber, 45 Ala. 237. If a county obtains the money or property of others without authority, the law, independently of statute, will compel restitution or compensation. Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; City of Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153.

*Agency—Ratification*

In minor contracts relating to small matters of detail entering into current expenses of the county, and in purely ministerial matters where official discretion is not required, contracts may be by parol, and may be made by agents or employés under special or general authority.<sup>37</sup> In these cases the general doctrines of the law of agency are controlling, and, in matters within the scope of the county purposes, contracts originally unauthorized may become valid and binding by ratification, so as to render the county liable thereon.<sup>38</sup> But ratification will not validate even an executed contract pertaining to matters beyond the limit of the county authority.<sup>39</sup>

<sup>37</sup> *City of Alton v. Mulledy*, 21 Ill. 76; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351; *Fanning v. Gregoire*, 16 How. (U. S.) 524, 14 L. Ed. 1043. See, also, *Schuykill County Com'r's v. Snyder*, 20 Pa. Co. Ct. R. 649; *Hanley v. Randolph County Court*, 50 W. Va. 439, 40 S. E. 389; *Black v. Board of Com'r's of Buncombe County*, 129 N. C. 121, 39 S. E. 818; *Steiner v. Polk County*, 40 Or. 124, 66 Pac. 707, where a county judge advised that a wounded pauper be taken to the hospital for treatment, and requested a physician to attend him and present his bill to the county court. The court allowed bills for care, board, and hospital charges, and it was held that such action constituted a ratification of the arrangement made by the judge, so as to render the county liable for the value of the physician's services. See *Duncombe v. City of Ft. Dodge*, 38 Iowa, 281.

<sup>38</sup> *Schmidt v. Stearns County*, 34 Minn. 112, 24 N. W. 358; *Morris County Com'r's v. Hinchman*, 31 Kan. 729, 3 Pac. 504; *Clarke v. Lyon County*, 8 Nev. 181; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *City of Galveston v. Morton*, 58 Tex. 409; *Wilhelm v. Cedar County*, 50 Iowa, 254; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331; *BROWN v. BON HOMME COUNTY*, 1 S. D. 216, 46 N. W. 173, *Cooley*, Cas. Mun. Corp. 372. In *Grenada County Sup'r's v. Brown*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704, it was declared that a subscription to the stock of a railway company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent enactment, when legislation of that character is not prohibited by the Constitution, and when that which is done would have been legal, had it been done under legislative sanction previously given.

<sup>39</sup> *Board of Jefferson County Sup'r's v. Arrighi*, 54 Miss. 668; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *City of Bryan*

**BORROWING MONEY****179. Liability cannot be fixed upon a county for money borrowed in its name without statutory authority.**

This rule applies to all cases of borrowing, even though the money borrowed be applied to strictly public purposes, and be within the scope of the county government.<sup>40</sup> In this respect the county is wholly unlike the private corporation. Not being for private profit, but solely for public use, it cannot engage in business ventures. Power to borrow money is not implied as an inherent power of a quasi corporation.<sup>41</sup> Public

v. Page, 51 Tex. 532, 32 Am. Rep. 637; Brown v. Mayor, etc., of City of New York, 63 N. Y. 239; Scott's Ex'rs v. City of Shreveport (C. C.) 20 Fed. 714; GREEN v. CITY OF CAPE MAY, 41 N. J. Law, 46, Cooley, Cas. Mun. Corp. 99. A county cannot ratify a contract to pay for extra materials and labor furnished to complete a county building, the value of which exceeded the statutory limit, which contract was void for the failure of the county commissioners to advertise for bids in the performance of such labor and furnishing of such materials. Tullock v. Webster County, 46 Neb. 211, 64 N. W. 705; Daviess County v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026.

<sup>40</sup> Goodnow v. Board of Com'rs of Ramsey County, 11 Minn. 31 (Gil. 12); Police Jury of Parish of Tensas v. Britton, 15 Wall. (U. S.) 566, 21 L. Ed. 251; Duke v. Williamsburg County, 21 S. C. 414; Lewis v. Board of Com'rs of Sherman County (C. C.) 5 Fed. 269; Curtis v. Leavitt, 15 N. Y. 9; Swackhamer v. Town of Hackettstown, 37 N. J. Law, 191; Gause v. Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276; Robertson v. Breedlove, 61 Tex. 316; Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. Ed. 164; Knapp v. Mayor, etc., of City of Hoboken, 39 N. J. Law, 394; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Thomas v. City of Port Huron, 27 Mich. 320. See, contra, Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; President, etc., of Bank of Chillicothe v. Mayor, etc., of Town of Chillicothe, 7 Ohio, 31, pt. 2, 30 Am. Dec. 185; Miller v. Board of Com'rs of Dearborn County, 66 Ind. 162. But see 1 Dill. Mun. Corp. §§ 117, 121-126.

<sup>41</sup> CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; Police Jury of Parish of Tensas v. Britton, 15 Wall. (U. S.) 566, 21 L. Ed. 251. See, also, Lynde v. Winnebago County, 16 Wall. (U. S.) 6, 21 L. Ed. 272, where the county had express legislative authority to borrow money for the erection of public buildings, when authorized by the voters

revenues are provided for its necessary expenses, and the wholesome rule prevails that a county must live within its means. Annual appropriations must not exceed annual revenues. If emergencies arise requiring extraordinary expenditure for the public good, resort must then be had to such extraordinary means as the legislature may provide. Most states have permanent general statutes providing for exigencies of frequent occurrence in the counties, such as the erection of costly public buildings, the purchase of expensive property for public use, the construction of some great public improvement within the sphere of county purposes, and also subscriptions in aid of quasi public corporations. In such cases power to borrow money is generally conditioned upon popular approval by public election. But unless forbidden by the Constitution, the Legislature may grant this power without popular consent,<sup>42</sup> and either by general legislation or by special act in favor of a particular county or class of counties. There are cases, however, holding counties liable for money loaned to the county and used by it strictly for county

at an election called for the purpose. In *Claiborne County v. Brooks* the court also declared that the power to issue negotiable paper cannot be conceded to counties and townships, which are political divisions, unless it is authorized by express legislation or by very strong implication. See, also, *City of St. Louis v. Alexander*, 23 Mo. 483; *Thompson v. Lee County*, 3 Wall. (U. S.) 327, 18 L. Ed. 177; 1 Dill. Mun. Corp. §§ 117-125; *Combs v. Letcher County*, 107 Ky. 379, 54 S. W. 177.

<sup>42</sup> *Allen v. Cerro Gordo County*, 34 Iowa, 54; *Crooke v. Board of Com'rs of Daviess County*, 36 Ind. 320; *Hobart v. Butte County Sup'rs*, 17 Cal. 23; *Pauly Jail Bldg. & Mfg. Co. v. Board of Com'rs of Kearney County*, 68 Fed. 171, 15 C. C. A. 351; *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787. The Iowa Code provides for the submission to the people of the question of expenditure for a county building of a sum over \$5,000, involving the levy of a tax, and renders the county supervisors incompetent to act in the erection of a building to cost more than that amount. It was held that, where there was money in the county treasury sufficient to pay the expense of the erection of a proposed county building, it is not necessary to submit the question of a tax levy to the people of the county. *Miller v. Merriam*, 94 Iowa, 126, 62 N. W. 689.

purposes, notwithstanding the contract was ultra vires; the action in such case not being upon the express contract, but for money had and received to the use of the county.<sup>43</sup>

*County Paper*

As a corollary of the above doctrine on borrowing money, it is held that counties cannot issue negotiable paper without legislative authority.<sup>44</sup> County warrants, in whatever form, drawn by the proper officer upon the county treasurer, or notes or duebills issued in the current business of the county, evidencing county obligations, are not public securities or negotiable instruments,<sup>45</sup> and do not, therefore, come within the provision of the law pertaining to those subjects. Generally

<sup>43</sup> Borough of Henderson v. Sibley County, 28 Minn. 515, 11 N. W. 91; Gray v. Board of Sup'rs of Tompkins County, 93 N. Y. 603; Stamp v. Cass County, 47 Mich. 330, 11 N. W. 183; State, to Use of Neal, v. Saline County Court, 48 Mo. 390, 8 Am. Rep. 108; Argenti v. City of San Francisco, 16 Cal. 255; Dowell v. City of Portland, 13 Or. 248, 10 Pac. 308; Board of Sup'rs of Sangamon County v. City of Springfield, 63 Ill. 66; Richardson v. County of Grant (C. C.) 27 Fed. 495; Lynde v. Winnebago County, 16 Wall. (U. S.) 6, 21 L. Ed. 272; CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366.

<sup>44</sup> CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; Goodnow v. Board of Com'rs of Ramsey County, 11 Minn. 31 (Gil. 12); Kirkbride v. Lafayette County, 108 U. S. 208, 2 Sup. Ct. 501, 27 L. Ed. 705; Clay v. Nicholas County Court, 4 Bush (Ky.) 154; Hawkins v. Board of Sup'rs of Carroll County, 50 Miss. 735; Board of Com'rs of Delaware County v. McClintonck, 51 Ind. 325; Mercer County v. Hackett, 1 Wall. (U. S.) 83, 17 L. Ed. 548; Clapp v. Cedar County, 5 Iowa, 15, 68 Am. Dec. 678; Thompson v. Lee County, 3 Wall. (U. S.) 327, 18 L. Ed. 177; Police Jury of Tensas Parish v. Britton, 15 Wall. (U. S.) 566, 21 L. Ed. 251; Marshall County Sup'r's v. Cook, 38 Ill. 44, 87 Am. Dec. 282; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042; Colburn v. Chattanooga Western R. Co., 94 Tenn. 43, 28 S. W. 298.

<sup>45</sup> Clark v. Polk County, 19 Iowa, 248; People ex rel. Raun v. Board of Sup'rs of El Dorado County, 11 Cal. 170; Crawford County v. Wilson, 7 Ark. 214; Campbell v. Polk County, 3 Iowa, 467; Board of Com'rs of Floyd County v. Day, 19 Ind. 450; International Bank of St. Louis v. Franklin County, 65 Mo. 105, 27 Am. Rep. 261; Carroll County v. United States ex rel. Reynolds, 18 Wall. (U. S.) 71, 21 L. Ed. 771; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Bauer v. Franklin County, 51 Mo. 205; Erskine v. Steele

they are held not to bear interest,<sup>46</sup> whatever may be their form, and, in the hands of assignees or indorsees, are subject to all defenses, legal and equitable, which the county would have against them in the hands of the original payee.<sup>47</sup>

### COUNTY BONDS

180. County bonds, when duly authorized by valid statute, and issued by proper county officers in substantial compliance with the terms and conditions of the statute, impose a legal liability upon the county, and, like other negotiable paper, are subject to the rules of the law of negotiable instruments.

The term "county bonds" is commonly used to include all written promises to pay money executed by a county which, if made by individuals, would be called "promissory notes."

County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; *McPeeters v. Blankenship*, 123 N. C. 651, 31 S. E. 876.

<sup>46</sup> *Camp v. Knox County*, 3 Lea (Tenn.) 199; *Gibson County v. Rains*, 11 Lea (Tenn.) 22; *Robbins v. Lincoln County Court*, 3 Mo. 57; *South Park Com'r's v. Dunlevy*, 91 Ill. 49; *People ex rel. Peoria & O. R. Co. v. Tazewell County*, 22 Ill. 147; *Madison County v. Bartlett*, 1 Scam. (Ill.) 67; *Rogers v. Lee County*, 1 Dill. 529, Fed. Cas. No. 12,013; *Hollingsworth v. Detroit*, 3 McLean, 472, Fed. Cas. No 6,613.

<sup>47</sup> *Garner v. State*, 5 Lea (Tenn.) 216; *Goyne v. Ashley County*, 31 Ark. 552; *Bauer v. Franklin County*, 51 Mo. 205; *United States ex rel. Carhart v. Miller County*, 4 Dill. 233, Fed. Cas. No. 15,776; *Shirk v. Pulaski County*, 4 Dill. 209, Fed. Cas. No. 12,794; *Carroll County v. United States*, 18 Wall. (U. S.) 71, 21 L. Ed. 771; *Gibson County v. Rains*, 11 Lea (Tenn.) 22; *Ouachita County v. Wolcott*, 103 U. S 559, 26 L. Ed. 505; *Wall v. Monroe County*, 103 U. S. 74, 26 L. Ed. 430; *Jerome v. Commissioners of Rio Grande County* (C. C.) 18 Fed. 873. See, also, *Police Jury of Tensas Parish v. Britton*, 15 Wall. (U. S.) 566, 21 L. Ed. 251; *CLAIBORNE COUNTY v. BROOKS*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; *Goodnow v. Board of Com'r's of Ramsey County*, 11 Minn. 31 (Gil. 12); *Hyde v. Franklin County*, 27 Vt. 185; *Erskine v. Steele County*, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499. But they have been held so far negotia-

The nature and extent of the obligation is shown in the face of the paper. The bond is executed by the county authorities as agents of the county. Their power depends upon the statutes. It may appear in the statute authorizing the issuance of the bonds, and designating the officer appointed to perform this function; or the agency for this purpose may be expressed in the general statutes. Legal appointment of the officer to this duty is essential to the validity of the bonds.<sup>48</sup> Unless he be the agent of the county for this purpose, he cannot bind his principal. Within the scope of his agency, the county is bound by his official action. Mere irregularities will not affect the validity of the bonds.<sup>49</sup> The fundamental question is the power of the county to issue the bonds. Having this power, it is the business of the county and its officers to execute it in a proper manner. It is not required of a bona fide purchaser that he shall go outside the record and inquire whether the agent has pursued his instructions, provided his act

ble as to render parties indorsing them liable as indorsers. *Campbell v. Polk County*, 49 Mo. 214; *State ex rel. Livesay v. Harrison*, 99 Mo. App. 57, 72 S. W. 469.

<sup>48</sup> *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005; *BROWN v. BON HOMME COUNTY*, 1 S. D. 216, 46 N. W. 173, Cooley, Cas. Mun. Corp. 372; *MERCHANTS' EXCH. NAT. BANK v. BERGEN COUNTY*, 115 U. S. 384, 6 Sup. Ct. 88, 29 L. Ed. 430; *Coler v. City of Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146; *Chisholm v. Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686. The Supreme Court of Tennessee having decided the board of commissioners of Shelby county to have been an unauthorized and illegal body, it was held, in an action on certain bonds issued by said board, that the power of de facto officers could not be invoked in the plaintiff's aid, as there could be no officers de facto where there is no office de jure, and the facts failed to show any ratification by the county. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. See, also, *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026.

<sup>49</sup> *Maddox v. Graham*, 2 Metc. (Ky.) 56; *City of San Antonio v. Lane*, 32 Tex. 405; *Danielly v. Cabaniss*, 52 Ga. 211; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; *BROWN v. BON HOMME COUNTY*, 1 S. D. 216, 46 N. W. 173, Cooley, Cas. Mun. Corp. 372; *Potter v. Lainhart*, 44 Fla. 647, 33 South. 251; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331.

be within the scope of his authority.<sup>50</sup> The general doctrines of agency apply to county bonds. If upon their face they appear to be in pursuance of the authority lawfully conferred, a purchaser in good faith may assume compliance with instructions by the agent. The bad faith or misconduct of the duly authorized agent is the misfortune of his principal, and is not visited by the law upon an innocent third party.<sup>51</sup>

#### *Authority—Indispensable*

Payment of county bonds is ordinarily resisted (1) for want of authority in the county to execute the bonds; (2) for illegal exercise of the authority. The first objection, if well made, is always fatal.<sup>52</sup> Even a bona fide holder for value

<sup>50</sup> Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Cromwell v. Sac County, 96 U. S. 58, 24 L. Ed. 681; Knox County v. Aspinwall, 21 How. (U. S.) 539, 16 L. Ed. 208; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; Manhattan Co. v. City of Ironwood, 74 Fed. 535, 20 C. C. A. 642; City of Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; Board of Com'rs of Comanche County v. Lewis, 133 U. S. 198, 10 Sup. Ct. 286, 33 L. Ed. 604. Where refunding bonds, payable to bearer, recite that they are issued in conformity with an act authorizing the county to issue such bonds and provide for retirement of outstanding bonds, a purchaser is not bound to investigate the nature of the refunded indebtedness. Ashley v. Board of Sup'r's of Presque Isle County, 8 C. C. A. 455, 60 Fed. 55. See Territory ex rel. Jones v. Hopkins, 9 Okl. 133, 59 Pac. 976. As to recitals other than upon the face of the bonds, as a certificate indorsed on the bond to the effect that the requirements had been complied with in their issuance, see Bolles v. Perry County, 92 Fed. 479, 34 C. C. A. 478. Where county officers issue their obligations, it will be presumed that they were issued for lawful corporate purposes, within the scope of the officers' powers. Board of Com'rs of Custer County v. De Lana, 8 Okl. 213, 57 Pac. 162.

<sup>51</sup> Moran v. Miami County, 67 U. S. (2 Black.) 722, 17 L. Ed. 342; Moultrie County v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Town of Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; BROWN v. BON HOMME COUNTY, 1 S. D. 216, 46 N. W. 173, Cooley, Cas. Mun. Corp. 372; Wesson v. Saline County, 73 Fed. 917, 20 C. C. A. 227; Belo v. Forsyth County Com'rs, 76 N. C. 489.

<sup>52</sup> Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489,

cannot withstand it.<sup>53</sup> The bond is void. Ratification cannot validate it.<sup>54</sup> Estoppel cannot be invoked to save it.<sup>55</sup> Unless the state has conferred upon the county authority to impose this liability upon its people and property, the bond places no obligation upon them, and cannot be enforced by any judicial tribunal. Such an unauthorized instrument is, in the view of the law, like a piece of blank paper, and no merit or good faith of the holder can give it vitality or legal obligation. If, therefore, there be no statute or constitutional provision empowering the county to make the bond,<sup>56</sup> or if the statute be unconstitutional,<sup>57</sup> or if the purpose for which

28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; Blair v. Cuming County, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457; Wells v. Pontotoc County, 102 U. S. 625, 26 L. Ed. 122; Clay v. Nicholas County Court, 4 Bush (Ky.) 154.

<sup>53</sup> Ogden v. Daviess County, 102 U. S. 634, 26 L. Ed. 263; Wells v. Pontotoc County, 102 U. S. 625, 26 L. Ed. 122; Harshman v. Bates County, 92 U. S. 569, 23 L. Ed. 747; Bates County v. Winters, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. Ed. 744; English v. Chicot County, 26 Ark. 454. The cases in this and the previous note establish the doctrine that the authority to issue bonds for strictly county purposes may be implied from general or special power conferred by statute on the county. Authority to issue bonds in aid of railroads or other works of public nature must be expressly conferred by statute.

<sup>54</sup> Daviess County v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; City of Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 631, 27 L. Ed. 669; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Kelley v. Town of Milan, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77; Coleman v. Broad River Tp., 50 S. C. 321, 27 S. E. 774.

<sup>55</sup> Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Citizens' Savings & Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Williamson v. City of Keokuk, 44 Iowa, 88; Bissell v. City of Kankakee, 64 Ill. 249, 21 Am. Rep. 554; Town of Douglass v. Niantic Savings Bank, 97 Ill. 228; Lamoille Val. R. Co. v. Selectmen, etc., of Town of Fairfield, 51 Vt. 257.

<sup>56</sup> CLAIBORNE COUNTY v. BROOKS, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, Cooley, Cas. Mun. Corp. 366; Carter County v. Sinton, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701; Provident Life & Trust Co. v. Mercer County, 170 U. S. 600, 18 Sup. Ct. 788, 42 L. Ed. 1156.

<sup>57</sup> German Savings Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; Steines v. Franklin County, 48 Mo. 167, 8 Am.

the bond was executed be purely private,<sup>58</sup> the bond is void, and the county cannot be held liable upon it.

*Irregularities—Recitals—Estoppel*

The defense of an illegal exercise of authority, though of tener made, is not so easily available. County bonds are commonly made payable to bearer, and many defenses allowed to the county against an original holder cannot be used against a bona fide holder for value. Moreover, defects in execution may be cured by ratification, lost by waiver, or covered by estoppel. The county or the Legislature may ratify by subsequent action bonds originally invalid by reason of some irregularity in their execution.<sup>59</sup> The Legislature may validate an irregular issue of bonds, provided it has constitutional power to authorize an original issuance thereof.<sup>60</sup> The county, with full knowledge of the facts, may, by long acquiescence and recognition of the obligation, waive any original

Rep. 87; Columbia County Com'rs v. King, 13 Fla. 451; Harshman v. Bates County, 92 U. S. 569, 23 L. Ed. 747; Wells v. Pontotoc County, 102 U. S. 625, 26 L. Ed. 122; Ogden v. Daviess County, 102 U. S. 634, 26 L. Ed. 263; Amoskeag Nat. Bank v. Ottawa, 105 U. S. 667, 26 L. Ed. 1204.

<sup>58</sup> Cooley, Const. Lim. (6th Ed.) pp. 129, 175, 214; Osborne v. Adams County, 106 U. S. 181, 1 Sup. Ct. 168, 27 L. Ed. 129; Sharpless v. Mayor, etc., of City of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 31 Atl. 208, 27 L. R. A. 72; Allen v. Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185; Brodhead v. City of Milwaukee, 19 Wis. 624, 88 Am. Dec. 711; Weismer v. Village of Douglass, 64 N. Y. 91, 21 Am. Rep. 586.

<sup>59</sup> Steines v. Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Ritchie v. Franklin County, 22 Wall. (U. S.) 67, 22 L. Ed. 825; Otoe County v. Baldwin, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331; BROWN v. BON HOMME COUNTY, 1 S. D. 216, 46 N. W. 173, Cooley, Cas. Mun. Corp. 372; Noel Young Bond & Stock Co. v. Mitchell County, 21 Tex. Civ. App. 638, 54 S. W. 284; Watson v. De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061, where the county failed at time of issuance of the bonds to provide for levying a tax for their payment.

<sup>60</sup> Grenada County Sup'r's v. Brogden, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704; Anderson v. Santa Anna Tp., 116 U. S. 364, 6 Sup. Ct. 413, 29 L. Ed. 633; Utter v. Franklin, 172 U. S. 424, 19 Sup. Ct. 183, 43 L. Ed. 498; Steele County v. Erskine, 98 Fed. 217, 39 C. C. A. 173; Sykes v. Mayor, etc., of Town of Columbus, 55 Miss. 115;

objection to their irregularity,<sup>61</sup> or by the recitals in the bonds it may estop itself from asserting invalidity arising out of irregular execution.<sup>62</sup> But the act of ratification must be by due authority; <sup>63</sup> the waiver must be with knowledge, actual or constructive;<sup>64</sup> and the act constituting the estoppel must have been performed by officers thereunto legally authorized.<sup>65</sup> A mayor having no authority to issue bonds has no power to perform an act of ratification,<sup>66</sup> and officers having no authority to determine or decide whether conditions precedent had been complied with cannot bind the county by recital of

*Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. Ed. 911; *Erskine v. Steele County* (C. C.) 87 Fed. 630.

<sup>61</sup> *Heed v. Commissioners of Cowley County* (C. C.) 82 Fed. 716; *Presidio County v. City Nat. Bank*, 20 Tex. Civ. App. 511, 44 S. W. 1069; *State ex rel. Moran v. Commissioners of Clinton County*, 6 Ohio St. 280; *Ray County v. Vansycle*, 96 U. S. 675, 24 L. Ed. 800; *Pendleton County v. Amy*, 13 Wall. (U. S.) 297, 20 L. Ed. 579; *Marshall County v. Schenck*, 5 Wall. (U. S.) 781, 18 L. Ed. 556; *Board of Sup'r's of Mercer County v. Hubbard*, 45 Ill. 139; *Jasper County v. Ballou*, 103 U. S. 745, 26 L. Ed. 422.

<sup>62</sup> *Moran v. Miami County*, 67 U. S. (2 Black) 722, 17 L. Ed. 342; *Knox County v. Aspinwall*, 21 How. (U. S.) 539, 16 L. Ed. 208; *Moultrie County v. Bank*, 92 U. S. 631, 23 L. Ed. 631; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *Coffin v. Board of Com'r's of Kearney County*, 57 Fed. 137, 6 C. C. A. 288; *BROWN v. BON HOMME COUNTY*, 1 S. D. 216, 46 N. W. 173, *Cooley, Cas. Mun. Corp.* 372.

<sup>63</sup> *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; *Daviess County v. Dickinson*, 117 U. S. 665, 6 Sup. Ct. 897, 29 L. Ed. 1026; *Board of Com'r's of Oxford v. Union Bank of Richmond*, 96 Fed. 298, 37 C. C. A. 493; *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87; *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

<sup>64</sup> *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215.

<sup>65</sup> *BROWN v. BON HOMME COUNTY*, 1 S. D. 216, 46 N. W. 173, *Cooley, Cas. Mun. Corp.* 372; *Coffin v. Board of Com'r's of Kearney County*, 57 Fed. 137, 6 C. C. A. 288; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *German Savings Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; *Moran v. Miami County*, 67 U. S. (2 Black) 722, 17 L. Ed. 342.

<sup>66</sup> *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77.

such compliance in the face of the bonds executed by them.<sup>67</sup> A public corporation is not estopped to deny the authority of persons assuming to act for it.<sup>68</sup> Public officers cannot acquire authority by their own declarations, and a body politic cannot be estopped thereby from denying their authority to bind it.<sup>69</sup> A bona fide purchaser of a county bond is not charged with constructive notice of objections to the validity of bonds being made by the county in pending litigation,<sup>70</sup> nor with knowledge of latent defects in the execution or issuance of county bonds;<sup>71</sup> but he is bound to take notice of the Constitution and laws of the state,<sup>72</sup> and particularly

<sup>67</sup> Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Board of Sup'rs of Carroll County v. Smith, 111 U. S. 562, 4 Sup. Ct. 539, 28 L. Ed. 517; Daviess County v. Dickinson, 117 U. S. 665, 6 Sup. Ct. 897, 29 L. Ed. 1026; Hedges v. Dixon County, 150 U. S. 188, 14 Sup. Ct. 71, 37 L. Ed. 1044; Mercer County v. Provident Life & Trust Co., 72 Fed. 623, 19 C. C. A. 44; Board of Com'rs of Oxford v. Union Bank of Richmond, 96 Fed. 298, 37 C. C. A. 493; Coffin v. Board of Com'rs of Kearney County, 57 Fed. 137, 6 C. C. A. 288.

<sup>68</sup> Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146; Merchants' Exch. Nat. Bank v. Bergen County, 115 U. S. 384, 6 Sup. Ct. 88, 29 L. Ed. 430; BROWN v. BON HOMME COUNTY, 1 S. D. 216, 46 N. W. 173, Cooley, Cas. Mun. Corp. 372.

<sup>69</sup> Chisholm v. Montgomery, 2 Woods, 584, Fed. Cas. No. 2,686; Flagg v. School Dist. No. 70 of Barnes County, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; Lehman v. City of San Diego, 83 Fed. 669, 27 C. C. A. 668; Board of Com'rs of Oxford v. Union Bank of Richmond, 96 Fed. 293, 37 C. C. A. 493; Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040; Daviess County v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026; Lake County v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; Lewis v. Shreveport, 108 U. S. 282, 2 Sup. Ct. 634, 27 L. Ed. 728.

<sup>70</sup> Board of Sup'rs of Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; Town of Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523; Stone v. Elliott, 11 Ohio St. 252; Cass County v. Gillett, 100 U. S. 585, 25 L. Ed. 585; Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; Mims v. West, 38 Ga. 18, 95 Am. Dec. 379.

<sup>71</sup> Knox County v. Aspinwall, 21 How. (U. S.) 539, 16 L. Ed. 208; State v. Board of Com'rs of Wichita County, 62 Kan. 494, 64 Pac. 45.

<sup>72</sup> Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. Ed. 1040;

the statute under which the bonds are issued,<sup>73</sup> the public records in relation to the issue,<sup>74</sup> and what appears upon the face of the instrument.<sup>75</sup>

#### *Recitals*

As to matters in pais, he may rely for his information upon the recitals contained in the bond—as, for example, if the statute requires popular consent as a condition precedent to the issuance of the bonds, and the county, by its proper officers thereunto duly authorized, recites in the face of the bond a compliance with the statutory conditions, the purchaser is warranted in acting upon this recital.<sup>76</sup> The rule of decision constantly applied by the Supreme Court of the United States in numerous cases involving this question is thus stated by Mr. Justice Strong: “Where it may be gathered from the legisla-

Merchants’ Exch. Nat. Bank v. Bergen County, 115 U. S. 391, 6 Sup. Ct. 88, 29 L. Ed. 430; Barnett v. Denison, 145 U. S. 139, 12 Sup. Ct. 819, 36 L. Ed. 652; Moore v. Mayor, etc., of City of New York, 73 N. Y. 238, 29 Am. Rep. 134; Sage v. Fargo Tp., 107 Fed. 383, 46 C. C. A. 361; Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048; Mitchell County v. City Nat. Bank, 91 Tex. 361, 43 S. W. 880.

<sup>73</sup> Barnett v. Denison, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. Ed. 652; Mercer County v. Provident Life & Trust Co., 72 Fed. 630, 19 C. C. A. 44; Gilson v. Dayton, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. Ed. 74; German Savings Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; Mitchell County v. City Nat. Bank, 91 Tex. 361, 43 S. W. 880.

<sup>74</sup> Shaw v. Independent School Dist., 77 Fed. 277, 23 C. C. A. 169; Valley County v. McLean, 79 Fed. 728, 25 C. C. A. 174; Supervisors of Marshall County v. Cook, 38 Ill. 44, 87 Am. Dec. 282.

<sup>75</sup> Gilson v. Dayton, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. Ed. 74; Bolles v. Perry County, 92 Fed. 479, 34 C. C. A. 478.

<sup>76</sup> Moultrie County v. Rockingham Ten-Cent Savings Bank, 92 U. S. 631, 23 L. Ed. 631; Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Coffin v. Board of Com’rs of Kearney County, 57 Fed. 137, 6 C. C. A. 288; Second Ward Savings Bank v. City of Huron (C. C.) 80 Fed. 661; Smith v. Clark County, 54 Mo. 58; Wilkinson v. City of Peru, 61 Ind. 1. Where a county court, under color of an election issued bonds for aiding a railroad, such bonds were declared void and ultra vires, as being in violation of a constitutional provision forbidding all municipal subscriptions in aid of railroad companies, except where authorized under existing law by vote of the people. Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048.

tive enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been made in bonds issued by them and held by a bona fide purchaser is conclusive of the fact, and binding upon the municipality.”<sup>77</sup> And in a later case it was added: “It is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify.”<sup>78</sup> In further explication of this subject the same court declared: “The facts which a public corporation is not permitted, as against a bona fide holder, to question in the face of recital in the bond of their existence, are those connected with or occurring out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued.”<sup>79</sup>

#### *Excessive Issues*

This recital in the face of the bond of compliance with conditions precedent has been held conclusive even in cases of alleged overissue of bonds, where the law empowers the officers issuing the bonds to decide, on proof of facts aliunde, the value of the county property upon which is to be computed the amount of bonds which the county may lawfully issue;<sup>80</sup> but where the statute makes reference to some record as evidence of this valuation, such as an assessment roll or a census report, then, notwithstanding a recital in the bond of full compliance with the law, the purchaser is bound to

<sup>77</sup> *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579.

<sup>78</sup> *Inhabitants of Bernards Tp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. 333, 33 L. Ed. 766.

<sup>79</sup> *Northern Nat. Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258.

<sup>80</sup> *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *New Providence Tp. v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904.

take notice of such facts as the records, referred to for authority in the statute, disclose concerning the valuation of the taxable property.<sup>81</sup> He is charged with knowledge of the statutory reference to this source of information, and also of the facts therein disclosed; and these records, rather than the recitals in the bonds, will prevail in any contention over their validity based upon allegations of excessive issue.<sup>82</sup>

### FISCAL MANAGEMENT

181. The fiscal management of counties is commonly prescribed with particularity in the general, permanent statutes of the state; and, in matters wherein specific directions are not given, the analogies, rules, and practice of the state government, rather than of private corporations, is favored by the courts.

Every state has its peculiar form of county organization, created by Constitution and statute, wherein are specified the

<sup>81</sup> Francis v. Howard County, 54 Fed. 487, 4 C. C. A. 460; Valley County v. McLean, 79 Fed. 728, 25 C. C. A. 174; Quaker City Nat. Bank v. Nolan County (C. C.) 59 Fed. 680; Citizens' Bank v. City of Terrell, 78 Tex. 456, 14 S. W. 1003. See, also, Rathbone v. Board of Com'rs of Kiowa County, 83 Fed. 125, 27 C. C. A. 477; Heed v. Commissioners of Cowley County, Kan. (C. C.) 82 Fed. 716; Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270, 38 C. C. A. 167; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; Chaffee County Com'rs v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040. But where the limit of an issue of bonds is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, or they have better access to the information than other persons, and can ascertain the amount with more certainty than strangers, then the bonds will be held valid in the hands of bona fide holders. Chilton v. Town of Gratton (C. C.) 82 Fed. 873.

<sup>82</sup> Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270, 38 C. C. A. 167; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; Chaffee County Com'rs v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; Val-

various officers of the county government, and the duties and functions of each. The assessment, collection, and appropriation of county revenues, and the disposition of county funds, are specifically regulated and directed by those statutes which give to each state its own peculiar rules of fiscal management. But since human foresight cannot provide for every possible contingency, many things are necessarily taken for granted. In the interpretation and application of these statutes the courts are averse to recognizing and following the rules and usages of private corporations,<sup>83</sup> but, because of the purely public character and functions of counties, are inclined to conform rather to the rules and usages prevailing in the fiscal management of the state government, wherever practicable.<sup>84</sup> Most county officers, indeed, charged with fiscal functions, rep-

ley County v. McLean, 79 Fed. 728, 25 C. C. A. 174; Shaw v. Independent School Dist., 77 Fed. 277, 23 C. C. A. 169.

The Supreme Court of the United States has necessarily come to be the chief source of the law of public securities, because of the great number of cases hitherto decided by it, and the preference of bondholders for federal decisions bringing nearly all cases of importance into the federal tribunals. County bonds, being negotiable instruments, are generally in the hands of nonresident holders, to whom these courts are open on account of diverse citizenship. Having the choice of forum, they naturally choose the one whose jurisprudence is most acceptable to them. The state Supreme Courts have generally concurred with the federal authority in their decisions. They have not adopted in toto the recital doctrine in its full measure, but have rather heeded the wise monitions of Judge Dillon as to the rules which should prevail with reference to this class of negotiable paper. 1 Dill. Mun. Corp. §§ 549-553. The federal courts hold that the recitals of the bond are sufficient, and, in the hands of a bona fide holder, are conclusive evidence of compliance with the law and with conditions precedent. The state courts consider recitals as only *prima facie* evidence, and allow proof to show that legal requirements have not been observed. It may safely be assumed that the federal rules will decide nearly every contention over these securities, and probably come to be generally recognized in the state courts, with slight modifications yet to be made by the federal Supreme Court.

<sup>83</sup> Coles v. Madison County, 1 Ill. (Breese) 154, 12 Am. Dec. 161.

<sup>84</sup> Milam County v. Bateman, 54 Tex. 165; People ex rel. City of Springfield v. Power, 25 Ill. 187.

resent both the state and the county, and, in matters of assessment and collection of revenue, perform the same duties for each. The appropriation and disbursement of the county revenue are purely county functions, as is likewise the audit of county claims.<sup>85</sup>

### *County Claims*

It is a general rule that, before suit can be brought upon any county claim, it must be duly presented for audit.<sup>86</sup> In some states the rule prevails that the action of the county board of audit is conclusive, unless appealed from, both upon the county and claimant.<sup>87</sup> In others, it is only *prima facie* evidence in favor of a claim, and the county may thereafter contest its validity;<sup>88</sup> while a rejection of the claim by the auditing authority amounts to a mere refusal to pay, and gives the claimant his right of action.<sup>89</sup>

<sup>85</sup> Mayor, etc., of City of Nashville v. Towns, 5 Sneed (Tenn.) 186; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822.

<sup>86</sup> Autauga County v. Davis, 32 Ala. 703; Board of Sup'rs of Lawrence County v. City of Brookhaven, 51 Miss. 68; Board of Com'rs of Sullivan County v. Arnett, 116 Ind. 438, 19 N. E. 299; Armstrong v. Tama County, 34 Iowa, 309; McCann v. Sierra County, 7 Cal. 121; Waitz v. Ormsby County, 1 Nev. 370; Board of Com'rs of Washington County v. Clapp, 83 Minn. 512, 86 N. W. 775; Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941; Lorsbach v. Lincoln County, Nev. (C. C.) 94 Fed. 963.

<sup>87</sup> Board of Com'rs of Warren County v. Gregory, 42 Ind. 32; Moser v. Boone County, 91 Iowa, 359, 59 N. W. 39; Endriss v. Chippewa County, 43 Mich. 317, 5 N. W. 632; Taylor v. Marion County, 51 Miss. 731. See, also, State v. Griggsby, 6 Ohio N. P. 202; Taylor v. Davey, 55 Neb. 153, 75 N. W. 553; Trites v. Hitchcock County, 53 Neb. 79, 73 N. W. 215; Lamberson v. Jefferds, 118 Cal. 363, 50 Pac. 403; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369. But see Dean v. Saunders County, 55 Neb. 759, 76 N. W. 450; Board of Com'rs of Huntington County v. Buchanan, 21 Ind. App. 178, 51 N. E. 939.

<sup>88</sup> Leavenworth County Com'rs v. Keller, 6 Kan. 510; Ryan v. Dakota County, 32 Minn. 138, 19 N. W. 653; Abernathy v. Phifer, 84 N. C. 711; Jones v. Commissioners of Lucas County, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710.

<sup>89</sup> Gillett v. Lyon County Com'rs, 18 Kan. 410; Boswell v. Board of Com'rs of Albany County, 1 Wyo. 235; Murphy v. Steele County

*Compensation of County Officers*

County officers are compensated for their services either by salary, fees, or commissions fixed by law. This limit of compensation cannot be transgressed by the county by extra allowance without statutory authority.<sup>90</sup> The basis of this rule is that the officer has, by taking the office, agreed to perform all the duties of the office, whether prescribed at the date of his induction or subsequently added by statute, for the compensation fixed by law,<sup>91</sup> and that these include all services performed in the line of his official employment.<sup>92</sup> It has accordingly been held that public corporations cannot lawfully allow extra compensation to attorneys, physicians, and other county officers for extraordinary services rendered by them in the line of their professional and official duty, though they were not foreseen or contemplated at the time of induction into office.<sup>93</sup> So, likewise, where service had been rendered by persons in effecting the organization of a county, they cannot be treated as preliminary or quasi officers, nor can they receive compensation for services rendered in promoting and

Com'rs, 14 Minn. 67 (Gil. 51); Waitz v. Ormsby County, 1 Nev. 370; Clay County v. Chickasaw County, 76 Miss. 418, 24 South. 975.

<sup>90</sup> Gilmore v. Lewis, 12 Ohio, 281; Albright v. Bedford County, 106 Pa. 582; Wayne County v. Reynolds, 126 Mich. 231, 85 N. W. 574, 86 Am. St. Rep. 541; Garfield County v. Leonard, 26 Colo. 145, 57 Pac. 693; Ellis v. Steuben County, 153 Ind. 91, 54 N. E. 382; Grant County Com'rs v. McKinley, 8 Okl. 128, 56 Pac. 1044; Jones v. Commissioners of Lucas County, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710; The Judges' Salary Cases, 110 Tenn. 370, 75 S. W. 1061, holding statute unconstitutional.

<sup>91</sup> 1 Dill. Mun. Corp. § 233; Glavey v. U. S., 35 Ct. Cl. (U. S.) 242. But see Id., 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247.

<sup>92</sup> Heslep v. City of Sacramento, 2 Cal. 580; Debolt v. Trustees of Cincinnati Tp., 7 Ohio St. 237; Pilie v. City of New Orleans, 19 La. Ann. 274; Hatch v. Mann, 15 Wend. (N. Y.) 44; Hobbs v. City of Yonkers, 102 N. Y. 13, 5 N. E. 778; Brissenden v. Clay County, 161 Ill. 216, 43 N. E. 977.

<sup>93</sup> Henderson County v. Dixon, 63 S. W. 756, 23 Ky. Law Rep. 1204; Sipler v. Clarion County, 8 Pa. Dist. R. 253; Morgantown Deposit Bank v. Johnson, 108 Ky. 507, 56 S. W. 825; Carroll v. City of St. Louis, 12 Mo. 444; Memphis v. Brown, 20 Wall. (U. S.) 289, 22 L. Ed. 264; Callagan v. Hallett, 1 Caines (N. Y.) 104; Preston v.

competing the county organization.<sup>94</sup> A de facto officer may lawfully claim and receive official salary until his official right to the office has been adversely decided,<sup>95</sup> but he cannot maintain an action for salary.<sup>96</sup> A majority of cases hold that the de jure officer cannot recover from a county the salary paid by it to the de facto officer,<sup>97</sup> but has his action there-

Bacon, 4 Conn. 471; Shattuck v. Woods, 1 Pick. (Mass.) 175; Smith v. Smith, 1 Bailey (S. C.) 70. But see, contra, Huffman v. Board of Com'rs of Greenwood County, 23 Kan. 281; McBride v. Grand Rapids, 47 Mich. 236, 10 N. W. 353. The Judges' Salary Cases, 110 Tenn. 370, 75 S. W. 1061, declare unconstitutional and void a legislative act authorizing a county to pay additional salary to a judge of the state court sitting in that county only.

<sup>94</sup> Board of Com'rs of Fremont County v. Perkins, 5 Wyo. 166, 38 Pac. 915.

<sup>95</sup> McVeany v. Mayor, etc., of City of New York, 80 N. Y. 185, 36 Am. Rep. 600; Steubenville v. Culp, 38 Ohio St. 18, 43 Am. Rep. 417; Michel v. City of New Orleans, 32 La. Ann. 1094; Parker v. Board of Com'rs of Dakota County, 4 Minn. 59 (Gil. 30); Brinkerhoff v. Jersey City, 64 N. J. Law, 225, 46 Atl. 170; Atchison v. Lucas, 83 Ky. 451; Manor v. State ex rel. Stoltz, 149 Ind. 310, 49 N. E. 160; Sullivan v. Haacke, 5 Ohio N. P. 26. The acts and judgments of a de facto officer are as valid and binding as though performed and rendered by an officer de jure. Dredla v. Baache, 60 Neb. 655, 83 N. W. 916; Morford v. Territory, 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513. See, also, Wilson v. Brown, 109 Ky. 229, 58 S. W. 595, 22 Ky. Law Rep. 708; Id. (Ky.) 59 S. W. 513.

<sup>96</sup> Andrews v. Portland, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; Romero v. United States, 24 Ct. Cl. (U. S.) 331, 5 L. R. A. 69. See Farrell v. City of Bridgeport, 45 Conn. 191; City of Vicksburg v. Groome (Miss.) 24 South. 306.

The charter of Jersey City provided for the appointment of a single person as city attorney. Two persons acted in that capacity as de facto officers. It was held that, while the acts of each were valid with respect to strangers, neither could maintain a suit for official salary. City of Jersey City v. Erwin, 59 N. J. Law, 282, 35 Atl. 948.

<sup>97</sup> Greeley County v. Milne, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 38 Am. St. Rep. 724; Nichols v. MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; Parker v. Board of Sup'rs of Dakota County, 4 Minn. 59 (Gil. 30).

If, during the incumbency of an officer de facto, and before any judgment of ouster has been rendered against him, the city or county of which he is such officer de facto pays him the salary of the office, a very decided preponderance of authorities sustains the position that by means of such payment the right of the officer de jure

for against the ousted de facto officer.<sup>98</sup> The opposite view has been strongly maintained in municipal decisions in several states.<sup>99</sup>

to collect his salary from such city or county is lost. *Board of Auditors of Wayne County v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Shaw v. Pima County*, 2 Ariz. 399, 18 Pac. 273; *State ex rel. Vail v. Clark*, 52 Mo. 508; *Smith v. Mayor, etc., of City of New York*, 37 N. Y. 518; *Westberg v. Kansas City*, 64 Mo. 493; *McVeany v. Mayor, etc., of City of New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Dolan v. Mayor, etc., of City of New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Steubenville v. Culp*, 38 Ohio St. 23, 43 Am. Rep. 417; *Saline County Com'rs v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171.

If a judgment of ouster has been entered against an officer de facto, and salary is thereafter paid to him, the officer de jure may maintain an action therefor against the city or county, notwithstanding such payment. *McVeany v. Mayor, etc., of City of New York*, *supra*.

If none of the salary has been paid to the officer de facto, the officer de jure, although he performs no duties of the office, may maintain an action against the city and county for the salary and emoluments thereof. *Comstock v. City of Grand Rapids*, 40 Mich. 397.

A county or municipality which has paid a salary to a de facto officer, who performed the duties of the office under color of title, while the right to it was in litigation, cannot be held liable therefor again to another who may thereafter establish his title to the office. *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308.

But in Tennessee and California it has been in several cases held that a de jure officer can maintain an action against a city, county, or other public body charged with the duty of making payment of the salary office for the payment of such salary, where it has been paid to a de facto officer. *Mayor, etc., of City of Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Savage v. Pickard*, 14 Lea (Tenn.) 46; *People ex rel. Dorsey v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193.

<sup>98</sup> In an action by a de jure officer against a person wrongfully in possession of the office for fees received by the incumbent, plaintiff is entitled to recover the entire amount received by defendant, though the value of defendant's services equals the fees received. *Wenner v. Smith*, 4 Utah, 238, 7 Pac. 293.

If he has in fact received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer de jure, in any appropriate form of action.

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<sup>99</sup> See note 99 on following page.

*County Revenues*

County revenues are generally divided into distinct funds for separate purposes, such as schools, roads, bridges, buildings, and current expenses, and claims allowed are charged to the proper fund and warrants drawn accordingly. The county treasurer can pay a warrant only out of the fund upon which it is drawn; and, if the fund be insufficient or exhausted, he cannot pay out of any other special fund,<sup>1</sup> but may pay out of a general fund in his hands unappropriated for that year, or

*Douglass v. State ex rel. Wright*, 31 Ind. 429; *Lawlor v. Alton*, 8 Ir. R. C. L. 160; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52.

An officer de facto is not entitled to the salary of the office, and, although he may faithfully discharge its duties, he cannot maintain an action against the city or county for the compensation to which he would have been entitled if he were an officer de jure. *McCue v. Wapello County*, 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134; *Matthews v. Board of Sup'rs of Copiah County*, 53 Miss. 715, 24 Am. Rep. 715; *Dolan v. Mayor, etc., of City of New York*, 68 N. Y. 274, 23 Am. Rep. 168.

In *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584, it was held that one elected to an office, but excluded therefrom by an intruder, who collected the fees and emoluments pertaining thereto, may recover against such intruder in an action of indebitatus assumpsit, though he had not previously qualified as such officer by taking the oath and executing the bonds prescribed by law.

In New Jersey an officer de jure cannot recover from an officer de facto the emoluments of office received by the latter while in the discharge of its duties in good faith, and in the belief that he was entitled to the office and its emoluments. *Stuhr v. Curran*, 44 N. J. Law, 181, 43 Am. Rep. 353.

See, also, *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; *Bier v. Gorrell*, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17; *Hunter v. Chandler*, 45 Mo. 452; *Petit v. Rousseau*, 15 La. Ann. 239.

<sup>29</sup> *Mayor, etc., of City of Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; *Kempster v. City of Milwaukee*, 97 Wis. 343, 72 N. W. 743; *Larsen v. City of St. Paul*, 83 Minn. 473, 86 N. W. 459. See *Dickerson v. City of Butler*, 27 Mo. App. 9.

<sup>1</sup> *Campbell v. Polk County Court*, 76 Mo. 57; *People v. Wood*, 71 N. Y. 371; *Clark v. City of Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; *Pease v. Inhabitants of Cornish*, 19 Me. 191.

out of the particular fund collected the ensuing year. Failure to pay the claim on demand authorizes suit and judgment against the county.<sup>2</sup>

## TAXATION

182. The power of taxation is an attribute of sovereignty, and can therefore be exercised only for public purposes, and by officers and agencies created and thereunto authorized by law.

Counties possess only such measure of this power as is expressly conferred upon them by statute for the purposes therein prescribed.

### *Assessment*

The elements constituting taxation are assessment, levy, and collection. These can be exercised by the county only upon the property and persons within its limits.<sup>3</sup> A single assessment of the property in a county is generally provided by law as the basis of all taxes levied—state, county, and town or township. In states where town and township functions are most important, assessment is made by officers of those organizations constituting the county. In other states the assessment is made by a county officer or county officers. The mode and manner of such assessment are prescribed and regulated by statute law. To insure a just apportionment of the burden of taxation, state and county boards of equalization are provided, which have general authority to correct errors of assessment, to the end that such assessments may be uniform and equal. Errors made by assessments in the ownership or

<sup>2</sup> Cobb County v. Adams, 68 Ga. 51; Curtis v. Cass County, 49 Iowa, 421; Taylor v. Marion County, 51 Miss. 731; Clark v. City of Des Moines, *supra*. See Modoc County v. Madden, 120 Cal. 555, 52 Pac. 812.

<sup>3</sup> Cooley, Const. Lim. (6th Ed.) pp. 615-621; Sangamon & M. R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497; Mills v. Thornton, 26 Ill. 300, 79 Am. Dec. 377; Carrier v. Gordon, 21 Ohio St. 605; Blood v. Sayre, 17 Vt. 609; Wells v. City of Weston, 22 Mo. 384,

valuation of property are corrected by these boards upon appeal to them, and their decision is generally held to be final.<sup>4</sup>

### *Levy*

The levy of taxes for county purposes, being a matter peculiarly of local knowledge and interest, is committed by the state to the county board or court, which is empowered to fix the rate of the annual levy.<sup>5</sup> In some states the statutes set no limit upon the amount of the county levy, but commit this subject entirely to the discretion of the county authorities. In others, the amount of the county levy is limited by law—as, for example, that the amount or rate for county purposes shall not exceed that for state purposes. Within this limit, the county authorities have full discretion in making the annual levy for county purposes.<sup>6</sup> This function is legislative, and not judicial, and from the action of the county authorities in

<sup>4</sup> Am. Dec. 627; *Swift v. City of Newport*, 7 Bush (Ky.) 37; *Morford v. Unger*, 8 Iowa, 82. Injunction will lie, at the suit of a taxpayer, to restrain a county from incurring expense for equipping a free ferry outside the county, it having no authority to establish such a one. *Johnston v. Sacramento County*, 137 Cal. 204, 69 Pac. 962. See *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747; *Barnes v. Woodbury*, 17 Nev. 383, 30 Pac. 1068; *Ford v. McGregor*, 20 Nev. 446, 23 Pac. 508; *State v. Shaw*, 21 Nev. 222, 29 Pac. 321. Also, see *Denver & R. G. R. Co. v. Church*, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252; *Smith v. Mason*, 48 Kan. 586, 30 Pac. 170.

<sup>5</sup> *Fuller v. Gould*, 20 Vt. 643; *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525; *Davis v. Kalamazoo Tp.*, 1 Mich. N. P. 16; *Stewart v. Maple*, 70 Pa. 221; *Smith v. Board of Sup'rs of Jones County*, 30 Iowa, 531; *Bellinger v. Gray*, 51 N. Y. 613; *People ex rel. Shank v. Nichols*, 49 Ill. 517.

<sup>6</sup> *Burroughs, Tax.*, § 133; *Caldwell v. Burke County Justices*, 57 N. C. 323; *Perry v. City of Rockdale*, 62 Tex. 457; *STATE ex rel. JAMESON v. DENNY*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, Cooley, Cas. Mun. Corp. 4; *Smith v. Aberdeen Corp.*, 25 Miss. 458; *Osborne v. Mayor, etc., of Mobile*, 44 Ala. 493; *PEOPLE ex rel. LE ROY v. HURLBUT*, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36. See *State ex rel. Ross v. Headlee*, 22 Wash. 126, 60 Pac. 126.

<sup>6</sup> *Cannon County Justices v. Hoodenpyle*, 7 Humph. (Tenn.) 145; *Smith v. Aberdeen Corp.*, 25 Miss. 458; *Osborne v. Mayor, etc., of*

fixing this levy there is no appeal.<sup>7</sup> If the limit prescribed by law is transgressed by them, the taxpayers have recourse to the courts to enjoin collection of the excess beyond the lawful limit, or recover same back from the officer.<sup>8</sup> So, likewise, if the county authorities levy a tax for any purpose not authorized by law.<sup>9</sup> This levy must be made by the board of county authorities in regular session, and entered upon its minutes of the proceeding. This record is a sine qua non of a valid levy.<sup>10</sup> It must specify the several county purposes for which the respective levies are made, composing the aggregate of the county levy.<sup>11</sup> The sums received from these various sources constitute separate funds of the county to be applied

Mobile, 44 Ala. 493; PEOPLE ex rel. LE ROY v. HURLBUT, 24 Mich. 44, 9 Am. Rep. 103, Cooley, Cas. Mun. Corp. 36; Hilliard v. Bunker, 68 Ark. 340, 58 S. W. 362.

<sup>7</sup> Grant v. Lindsay, 11 Heisk. (Tenn.) 666; Obion County Court v. Marr, 8 Humph. (Tenn.) 634. See Dodge v. Mission Tp., Shawnee County, Kan., 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

<sup>8</sup> Vanover v. Davis, 27 Ga. 354; Fleming v. Mershon, 36 Iowa, 413; Mayor, etc., of City of Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686; City of Richmond v. Crenshaw, 76 Va. 936; Bright v. Halloman, 7 Lea (Tenn.) 309. An interested taxpayer may sue to prohibit the negotiability of funds issued by county commissioners for the payment of the construction of a road, based on the ground that the bonds are void, as being in excess of the limit prescribed by law. Owen County Com'r's v. Spangler, 159 Ind. 575, 65 N. E. 743. See, also, Rogers v. Board of Sup'r's of Westchester County, 77 App. Div. 501, 78 N. Y. Supp. 1081.

<sup>9</sup> Holland v. Mayor, etc., of City of Baltimore, 11 Md. 186, 69 Am. Dec. 195; City of Delphi v. Bowen, 61 Ind. 29; Leslie v. City of St. Louis, 47 Mo. 474.

In Grannis v. Board of Com'r's of Blue Earth County, 81 Minn. 55, 83 N. W. 495, it was declared that a taxpayer of the county might maintain an action to restrain the performance of an ultra vires contract by the county officials.

See, also, Franklin v. Baird, 9 Ohio S. & C. P. Dec. 715, 7 Ohio N. P. 571; Burness v. Multnomah County, 37 Or. 460, 60 Pac. 1005.

<sup>10</sup> Moser v. White, 29 Mich. 59; Farrar v. Fessenden, 39 N. H. 268; People v. Eureka Lake & Yuba Canal Co., 48 Cal. 143; West v. Whitaker, 37 Iowa, 598. But see Hilliard v. Bunker, 68 Ark. 340, 58 S. W. 362.

<sup>11</sup> Cooley, Const. Lim. (6th Ed.) p. 636; Kennedy v. Montgomery County, 98 Tenn. 179, 38 S. W. 1075; Clark v. City of Davenport, 14

to the objects specified in the levy.<sup>12</sup> A levy for a particular purpose by the county authorities amounts to an appropriation of that fund to that purpose, and, unless expressly authorized by statute, such fund cannot be diverted from that purpose by any county board or officer.<sup>13</sup>

#### *Collection*

The collection of county taxes is regulated by the statutes of the state, and is generally made at the same time, in the same way, and by the same officer as the collection of the state revenue. In some states county revenue is collected by the town officer at the same time with, and in the same manner as, the town revenue, and the collection officers of the several towns constituting the county pay over the county portion of the public tax to the county treasurer. This county officer, whether called "treasurer," "trustee," or by any other name, is the legal custodian of the county funds, and disburses the same only upon warrants drawn upon the county treasury by the officer intrusted with the fiscal management of its affairs.<sup>14</sup> Collection of county revenue from delinquent taxpayers is made in pursuance of the general statute of the state regulating this function. This is effected sometimes by enforcement of the tax lien upon the property, and sometimes

Iowa, 494; Simmons v. Wilson, 66 N. C. 336; Lott v. Ross, 38 Ala. 156; State v. Mayor, etc., of Ashland, 71 Wis. 502, 37 N. W. 809.

<sup>12</sup> Board of Com'r's of Tippecanoe County v. Cox, 6 Ind. 403; Campbell v. Polk County, 49 Mo. 214; Boro v. Phillips County, 4 Dill. 216, Fed. Cas. No. 1,663.

<sup>13</sup> Carroll County v. United States ex rel. Reynolds, 18 Wall. (U. S.) 71, 21 L. Ed. 771; Campbell v. Polk County, 49 Mo. 214; Nashville, C. & St. L. R. Co. v. Franklin County, 5 Lea (Tenn.) 707; Nashville, C. & St. L. R. v. Hodges, 7 Lea (Tenn.) 663; Smathers v. Commissioners of Madison County, 125 N. C. 480, 34 S. E. 554.

<sup>14</sup> A county treasurer cannot be compelled to receive money of which he is not made official custodian, nor to hold money, which he does receive, subject to any condition not imposed upon that fund by statute. Davis v. Patterson, 12 Pa. Super. Ct. 479. See Gartley v. People, to Use of Pueblo County, 28 Colo. 227, 64 Pac. 208; Wilson v. Wichita County, 67 Tex. 647, 4 S. W. 67.

by process against the owner.<sup>15</sup> The methods of assessment, levy, and collection in each state are regulated by the local statutes, and are so various and different in their details as to preclude the possibility of general treatment and consideration, and are too numerous and multiform for the compass of the present work. They can only be known and understood by a very careful study of the revenue statutes of the several states.

### *Principles*

The controlling decisions of the courts of the various states not only reflect the variety and differences in the systems of taxation, but are themselves sometimes inconsistent and irreconcilable on identical questions. For the most part, however, they concur in recognizing and establishing the following principles in regard to county taxation:

- (1) The county must be authorized by statute to levy the tax.<sup>16</sup>
- (2) It must be levied by the county board designated and empowered to perform that function.<sup>17</sup>
- (3) There must be an official record of the levy.<sup>18</sup>
- (4) The tax can be levied only upon persons and property or privileges within the limits of the county.<sup>19</sup>
- (5) The tax must be for a public purpose and a county object.<sup>20</sup>

<sup>15</sup> 2 Dill. Mun. Corp. §§ 815–822. See *Smith v. Riding*, 9 Houst. (Del.) 235, 22 Atl. 97.

<sup>16</sup> *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Daily v. Swope*, 47 Miss. 367; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Thompson v. Lee County*, 3 Wall. (U. S.) 330, 18 L. Ed. 177; *Caldwell v. Burke County Justices*, 57 N. C. 323; *City of Philadelphia v. Flanigen*, 47 Pa. 21.

<sup>17</sup> *Bright v. Halloman*, 7 Lea (Tenn.) 309; *West v. Whitaker*, 37 Iowa, 598; *Gearhart v. Dixon*, 1 Pa. 224.

<sup>18</sup> *People v. Eureka Lake & Yuba Canal Co.*, 48 Cal. 143; *Martin v. Cole*, 38 Iowa, 141; *Farrar v. Fessenden*, 39 N. H. 268; *Moser v. White*, 29 Mich. 59.

<sup>19</sup> See note 102.

<sup>20</sup> *Louisville & N. R. Co. v. Davidson County Court*, 1 Snead (Tenn.) 637, 62 Am. Dec. 424; *Leavenworth County Com'r's v. Miller*,

(6) There must be an assessment made by the officer or officers lawfully authorized to perform that function.<sup>21</sup>

(7) There must also be an official record of this assessment.<sup>22</sup>

(8) The tax levied must be equal and uniform upon all taxable objects in the county, or, if a local tax, upon all property and persons to be especially benefited thereby.<sup>23</sup>

(9) The official acts of county officers de facto in matters of taxation are valid and binding.<sup>24</sup>

<sup>21</sup> 7 Kan. 479, 12 Am. Rep. 425; State ex rel. North Missouri C. R. Co. v. Linn County Court, 44 Mo. 504; Thompson v. Lee County, 3 Wall. (U. S.) 327, 18 L. Ed. 177; Hill v. Forsythe County Com'rs, 67 N. C. 367; Weismar v. Village of Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

<sup>22</sup> Richmond & D. R. Co. v. Brogden, 74 N. C. 707; Stokes v. State, 24 Miss. 621; Town of Middletown v. Town of Berlin, 18 Conn. 189; Granger v. Parsons, 2 Pick. (Mass.) 392.

<sup>23</sup> Thurston v. Little, 3 Mass. 429; Bailey v. Ackerman, 54 N. H. 527; People v. Stockton & C. R. Co., 49 Cal. 414; People v. Hagedorn, 104 N. Y. 516, 10 N. E. 891; Roe v. St. John, 7 Neb. 139; Downing v. Roberts, 21 Vt. 441.

<sup>24</sup> City of East Portland v. Multnomah County, 6 Or. 62; Sanborn v. Rice County Com'rs, 9 Minn. 273 (Gil. 258); Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090.

<sup>24</sup> State ex rel. Newman v. Jacobs, 17 Ohio, 143; Laver v. McGlachlin, 28 Wis. 364; Scovill v. City of Cleveland, 1 Ohio St. 126; Rutledge v. Fogg, 3 Cold. (Tenn.) 554, 91 Am. Dec. 299; Cushing v. Inhabitants of Frankfort, 57 Me. 541; Washington County v. Miller, 14 Iowa, 584; Scott v. Watkins, 22 Ark. 564.

**SAME—LEGISLATIVE CONTROL**

183. **Legislative delegation to the county of the inherent taxing power of the state, with the power to appropriate county revenues, may be repealed at any time by the Legislature and resumed by the state, provided contractual obligations to third parties are not thereby impaired.**

Counties do not acquire vested rights in the powers conferred upon them. As remarked by Nelson, J., in *People v. Morris*,<sup>25</sup> "It is an unsound and even absurd proposition that political power conferred by the Legislature can become a vested right, as against the government, in any individual or body of men." It has accordingly been held that the Legislature may repeal a grant of power to levy and collect wharfage which had been pledged by the corporation, together with other revenues for the payment of bonds issued to obtain money to maintain and improve the wharf;<sup>26</sup> and generally it is said that the Legislature has the same power over the revenues of a county as over the immediate funds of the state.<sup>27</sup> And so in regard to a fund set apart for disabled officers, it was said by Mr. Justice Field in *Pennie v. Reis*:<sup>28</sup> "The direction of the state that the fund should be for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time at the will of the Legislature. There was no contract on the part of the state that its disposition should always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, was to be

<sup>25</sup> 13 Wend. (N. Y.) 335.

<sup>26</sup> *City of St. Louis v. Shields*, 52 Mo. 351.

<sup>27</sup> *Duval County Com'rs v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416; *Richland County v. Lawrence County*, 12 Ill. 1.

<sup>28</sup> 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426.

paid, there was no vested right in the officers to such payment." It has likewise been held that the Legislature may require a county to deliver a certain portion of its revenue levied and collected for county purposes to a municipality within its borders to be used for street repairs, even though the Constitution of the state forbade the Legislature to authorize counties to levy taxes for any other than county purposes.<sup>29</sup> So, also, it has been held competent for the Legislature to direct restitution to the taxpayer of all property exacted from him by taxation, into whatever form the property may have been changed, so long as it remained under the control of the corporation.<sup>30</sup> In California it has been held that the Legislature may refuse to provide funds to pay an existing indebtedness of the county, and may provide a county fund out of which the holders of the county paper may obtain fifty per cent. of the face value of the same whenever the county may choose to approve it.<sup>31</sup> But a county owing a debt of moral obligation to another county for certain expenses previously incurred may be compelled by act of legislation to satisfy the claim.<sup>32</sup> So, also, a county may be compelled by the Legislature to levy taxes to build and maintain a bridge over a stream within its boundaries,<sup>33</sup> to improve levees,<sup>34</sup> and even to issue bonds for the purpose of raising money to be expended in the construction and maintenance of highways within its limits.<sup>35</sup> The courts have likewise in numerous instances maintained that it is competent for the Legislature to compel a public corporation to levy a tax to

<sup>29</sup> Duval County Com'rs v. City of Jacksonville, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416.

<sup>30</sup> Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822.

<sup>31</sup> People v. Morse, 43 Cal. 534.

<sup>32</sup> Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575.

<sup>33</sup> Carter v. Cambridge & B. Bridge Proprietors, 104 Mass. 236.

<sup>34</sup> Easton & A. R. Co. v. Central R. Co., 52 N. J. Law, 267, 19 Atl. 722.

<sup>35</sup> Jensen v. Board of Sup'rs of Polk County, 47 Wis. 298, 2 N. W. 320; People v. Board of Sup'rs of San Luis Obispo County, 50 Cal. 561.

pay to an individual a debt which is just and honorable, though not binding in law, nor even enforceable in equity.<sup>36</sup>

<sup>36</sup> *Town of Guilford v. Board of Sup'rs of Chenango County*, 13 N. Y. 144; *People v. Board of Sup'rs of Essex County*, 70 N. Y. 228; *People ex rel. Blanding v. Burr*, 13 Cal. 343; *CITY OF NEW ORLEANS v. CLARK*, 95 U. S. 644, 24 L. Ed. 521, Cooley, Cas. Mun. Corp. 46; *Wrought Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204, 23 N. E. 542; *Hasbrouck v. City of Milwaukee*, 21 Wis. 219; *State ex rel. Arick v. Hampton*, 13 Nev. 441; *Vasser v. George*, 47 Miss. 713; *Sanborn v. Rice County Com'rs*, 9 Minn. 273 (Gil. 258).

In the leading case above cited, of town of Guilford v. Board of Sup'rs of Chenango County, the claim had been expressly rejected by the voters at an election authorized by special act of the Legislature, which declared that their action should be final and conclusive. Judge Cooley justifies the legislative action in this case upon the ground that it is the right and duty of the state to see that the powers which it confers upon public corporations are not abused to the injury of those who have relied upon them, and to prevent repudiation by them of their just obligations. Cooley, Tax'n (2d Ed.) 685.

For an elaborate opinion holding the contrary view, see *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

## CHAPTER XVIII

### QUASI CORPORATIONS OTHER THAN COUNTIES

- 184. In General.
- 185. New England Towns.
- 186. Townships.
- 187. School Districts.
- 188. Other Local Quasi Corporations.
- 189. Boards—Commissioners—Companies.

### IN GENERAL

184. Within the class of public quasi corporations are included, besides counties, all involuntary political subdivisions of the state made for the convenience and efficiency of civil administration, and also all public organizations of officers clothed with governmental authority, and charged with the performance of public duties.

Two elements enter into the consideration of a quasi corporation—territory and persons.<sup>1</sup> A corporation being a body of individuals, the latter element is the essential one. Distinct territorial limits, if not absolutely essential, will generally be found in every such corporation. The town, township, school district, road district, and drainage district are familiar illustrations of minor quasi corporations;<sup>2</sup> and in general it may be said that whenever the Legislature lays off a distinct subdivision of the state, either under general or special law, for some particular governmental purpose or purposes, without the request or consent of the inhabitants, and

<sup>1</sup> 1 Dill. Mun. Corp. § 40; Cooley, Const. Lim. (6th Ed.) p. 294.

<sup>2</sup> Harris v. School Dist. No. 10, in Canaan, 8 Fost. (28 N. H.) 58; Beach v. Leahy, 11 Kan. 23; Inhabitants of Fourth School Dist. in Rumford v. Wood, 13 Mass. 193; Littlewort v. Davis, 50 Miss. 403; Bassett v. Fish, 75 N. Y. 303.

invests them with the powers necessary therefor, a quasi corporation is thereby created.<sup>3</sup> Again, whenever the Legislature creates for any governmental purpose a board of officers, and charges them with the performance of public duties, whether for the state at large, or some portion thereof, such as a county, or a district embracing more or less than a county, a town or township, or a municipality, such board is generally treated as a quasi corporation. Illustrations of this are to be found in boards of education, of public works, boards of railroad and warehouse commissioners, and sanitary commissions.<sup>4</sup> Where these public functions are performed by a single person, he is generally called an officer, though in Tennessee it has been ruled that the Governor is a quasi corporation sole.<sup>5</sup> But consistently with the logical conception of a corporation—that it is a body of individuals organized under law for a distinct and definite purpose—the courts usually treat a public board of officers, whether municipal, county, or state, if it be specially created for a particular governmental purpose, as a quasi corporation.<sup>6</sup> For convenience these minor quasi corporations will be considered briefly in two groups: (a) those wherein the local subdivision is the prominent feature; (b) governmental boards or commissions.

<sup>3</sup> *School Town of Princeton v. Gebhart*, 61 Ind. 187; *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Inhabitants of Fourth School Dist. in Rumford v. Wood*, 13 Mass. 193; *Cooley, Const. Lim.* (6th Ed.) pp. 294, 295.

<sup>4</sup> A board of public works of a city is a quasi corporation, and the nature of its duties, laying out streets, establishing grades, sewers, etc., requires it to keep a record of its proceedings, although no such record is in terms provided for. *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22; *People v. Harper*, 91 Ill. 357; *Levy Court v. Coroner*, 2 Wall. (U. S.) 501, 17 L. Ed. 851; *Lower Board of Com'rs of Roads for St. Peter's Parish v. McPhefson*, 1 Speers (S. C.) 218; *Commissioners of Scioto v. Gherky*, Wright (Ohio) 493.

<sup>5</sup> *Polk v. Plummer*, 2 Humph. 500, 37 Am. Dec. 566; *Governor v. Allen*, 8 Humph. 178; *Felts v. Mayor of Memphis*, 2 Head, 656.

<sup>6</sup> *Elliott, Mun. Corp.* § 252; *Board of Commissioners of El Paso County v. Bish*, 18 Colo. 474, 33 Pac. 184; *White v. City Council of Charleston*, 2 Hill (S. C.) 571; *City of Detroit v. Blacheby*, 21 Mich. 84, 4 Am. Rep. 450.

## NEW ENGLAND TOWNS

185. The New England town, as the political unit of the state, closely resembles counties in other states, in character, powers, and organization. Being the most highly organized of all quasi corporations, it possesses in addition most of the characteristics of a municipality, and thus in many respects is controlled by the law of municipal corporations.

The New England town has been the subject of much legal discussion and judicial decision, as well as political panegyric. Though not of identical nature or uniform powers in the several New England states, it is recognized as of superior importance to the county in all of them.<sup>7</sup> The town is a constituent element of the county, not a subdivision of it. It is older than the county, and in Rhode Island is claimed to be older than the state.<sup>8</sup> It is the germ of political and social organization. From the beginning it has claimed and exercised governmental powers for the support of churches and schools, as well as the preservation of peace and order, the construction and care of public roads and bridges, and the support of the poor.<sup>9</sup> Only the sovereign functions of government were left by this masterful community to the colony or the state, and even some of them it was inclined to exercise. The people governed, not by delegates or representatives, but in person in their annual assemblies.<sup>10</sup> At these town meetings they determined the objects for which the town should appropriate money, levied the taxes therefor, and chose officers to manage

<sup>7</sup> Dill. Mun. Corp. § 28.

<sup>8</sup> See Arn. Hist. c. 7.

<sup>9</sup> 1 Dill. Mun. Corp. § 30; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Allen v. Inhabitants of Taunton, 19 Pick. (Mass.) 485; Burrill v. Boston, 2 Cliff. 590, Fed. Cas. No. 2,198.

<sup>10</sup> "The marked and characteristic distinction between a town organization and that of a city is that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and

all their affairs.<sup>11</sup> Some towns exercised special powers not claimed by others. The general statutes of the several states have specified the powers to be exercised by the towns, and are to be regarded generally as the measure and enumeration of those powers.<sup>12</sup> They are not, however, held to be exclusive, but in several instances the New England courts have

personal capacities, whereas in a city government this is all done by their representatives." *Warren v. Mayor and Aldermen of Charlestown*, 2 Gray (Mass.) 101.

<sup>11</sup> Justice Gray, in *Town of Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923, said: "The annual election of town officers, or any other act which the statutes require to be done by the inhabitants at each annual meeting, might perhaps be sufficiently proved by what was done at the meeting, without proving a special notice of it in the warning. But with these exceptions, such a notice is a necessary prerequisite to the validity of any act of the town either at annual meetings or at a special meeting."

See Cooley, *Const. Lim.* (6th Ed.) p. 223, note.

<sup>12</sup> "Towns in Connecticut, as in the other New England states, differ from trading corporations, and even from municipal corporations elsewhere. They are territorial corporations, into which the state is divided by the legislature from time to time, at its discretion, for political purposes and the convenient administration of the government; they have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs, and all the inhabitants of the town are members of the quasi corporation." *Town of Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923.

See *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Hooper v. Emery*, 14 Me. 375; *Coolidge v. Inhabitants of Brookline*, 114 Mass. 592.

Likewise, Chief Justice Perley, of New Hampshire, in a leading case, declared: "Towns are general, political, and territorial divisions of the county, with uniform powers and duties, defined and varied from time to time by general legislation. Towns in New England do not hold their powers ordinarily under any grant of the government to the individual corporation, or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which have imposed their public duties or fixed their territorial limits." *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

And Chief Justice Shepley, in *Hooper v. Emery*, 14 Me. 375, says: "The inhabitants of every town in this state are declared to be a body politic and corporate by the statute; but these corporations de-

ruled that a power might exist in a town by usage or prescription.<sup>13</sup>

### *Statutory Town Functions*

The principal statutory powers ordinarily exercised by a New England town are

- (1) To sue and be sued in the corporate name and capacity;
- (2) To acquire and hold real estate and personal property for the public use of the inhabitants, and also in trust for the support of the town schools, and to promote education therein;
- (3) To make contracts for the exercise of the corporate powers, and to dispose of corporate property;
- (4) To appropriate out of town revenues money for the following purposes: (a) Support of town schools; (b) care of the poor; (c) construction and repair of highways and bridges; (d) the destruction of noxious animals; (e) purchase and care of cemeteries; (f) the writing and publication of town histories, and the erection of buildings or monuments to the memory of soldiers and sailors; (g) all other necessary charges arising in the town government;<sup>14</sup>
- (5) To levy and collect taxes for town purposes;
- (6) To enact town ordinances.<sup>15</sup>

rive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated quasi corporations, and their whole capacity, powers, and duties are derived from legislative enactment."

These and kindred declarations of the law by the New England judges seem plainly to authorize the statement of the text that these towns are not municipal, but quasi, corporations. And yet it is not easy to distinguish the Massachusetts town from the ordinary municipality, when we consider its powers as declared by the Massachusetts General Statutes of 1860, whereby they are declared to be bodies corporate, with the powers enumerated in the text.

<sup>13</sup> Willard v. Inhabitants of Newburyport, 12 Pick. (Mass.) 227; Spaulding v. City of Lowell, 23 Pick. (Mass.) 71.

<sup>14</sup> 1 Dill. Mun. Corp. (4th Ed.) p. 47, note; Rutland v. Town of West Rutland, 68 Vt. 155, 34 Atl. 422.

<sup>15</sup> Easthampton v. Hill, 162 Mass. 302, 38 N. E. 502; Lovell v. Town of Charlestown, 66 N. H. 584, 32 Atl. 160. See State v. Hoff

*Town Meetings*

The annual town meeting is held at an appointed time, either in the spring or fall. It is composed of the qualified voters of the town. Special town meetings may be called on due notice by the selectmen or other statutory authority. At the annual meeting it is competent to elect the town officers for the ensuing year, levy the annual taxes, make appropriations for town purposes, and transact any other corporate business. At the special meeting only such business may be transacted as is expressed in the warrant calling the meeting. The selectmen constitute the governing board, and the officers are a town clerk, treasurer, collector, assessors, constables, and others of less importance.<sup>16</sup> "Towns are subject by the common law to an indictment for neglect of duties enjoined upon them, but are not liable to an action for such neglect unless the action be given by some statute."<sup>17</sup>

## TOWNSHIPS

**186. The township is a subdivision of a county vested with certain functions of local government, closely correlated with the county government, and less highly organized than the New England town.**

The township exists as an agency of the state government in a few of the Eastern states, in all of the Western states, from Ohio to the Pacific Ocean, and in a few of the states of the South. Its officers consist of a board of supervisors or trustees, in lieu of selectmen, with others the same as in the

(Tex. Civ. App.) 29 S. W. 672; State v. Tweedy, 115 N. C. 704, 20 S. E. 183.

<sup>16</sup> 1 Dill. Mun. Corp. (4th Ed.) p. 48, note 2. Relative to necessity for specification in warrant calling special meeting of such business as can be transacted at such meeting, see Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526; Arnold v. Price, Id. But see Mowry v. Mowry, 20 R. I. 74, 37 Atl. 306.

<sup>17</sup> Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63.

New England towns. It possesses only such functions and powers, and is subject to such liabilities only, as are provided by statute.<sup>18</sup> It is not governed by town meeting, but by a board of supervisors or trustees and the officers chosen at annual election. It is not so old as the county, but is organized within it under the government survey made generally by the federal government previous to its settlement. In the general plan of survey of the public lands of the United States a township is a division of territory six miles square, containing thirty-six sections, of which section sixteen is devoted to the public schools.<sup>19</sup> Generally in the Western states the government survey is the basis of the state organization of a township; but in some of the states, as in Tennessee, there are no quasi corporations of this name, although a considerable portion of the territory was surveyed by the general government in township form. The duties of the township officers are prescribed by general statute, and sometimes they are expected and required to perform county and even state functions. The statutes creating, organizing, and regulating townships in the various states are not identical; but they are so nearly alike as to give general uniformity to this agency of government in all the states where it exists.

#### *Township Bonds*

Many cases have been before the Supreme Court of the United States, involving the validity of township bonds issued under the statutes of different states empowering townships to subscribe in aid of the construction of railroads and other public improvements, in which the powers, functions, and fiscal management of these quasi corporations received careful ex-

<sup>18</sup> *Town of Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923; *Hooper v. Emery*, 14 Me. 375; *Vail v. Town of Amenia*, 4 N. D. 239, 59 N. W. 1092. See, also, *Doolittle v. Town of Walpole*, 67 N. H. 554, 38 Atl. 19; *Shoe v. Township of Nether Providence*, 3 Pa. Super. Ct. 137, 39 Wkly. Notes Cas. 437; *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258, 71 N. W. 1069; *Mueller v. Town of Cavour*, 107 Wis. 599, 83 N. W. 944.

<sup>19</sup> Rev. St. U. S. § 2395 (U. S. Comp. St. 1901, p. 1471).

amination at the hands of this great tribunal. The general result of these decisions has been to place townships, in the matter of their contracts and liabilities, upon substantially the same footing with counties; and to hold that township bonds, as to the power and regularity of issuance, the authority of officers, the effect of recitals in the bond, and the duty of the purchaser to take notice of constitutional and statutory provisions, are controlled by the same general principles of law as those applicable to county bonds, as hereinbefore explained.<sup>20</sup>

### SCHOOL DISTRICTS

187. School districts are the most numerous and universal of all the local subdivisions of the state made for public purposes, and belong to the lowest of the quasi corporations in the scale of organization.

Nearly every town, township, and civil district in the United States is subdivided into school districts, which are created and organized for the purpose of establishing and maintaining the free public school system of the state. Their powers and functions are generally uniform in each state, but not in the several states.<sup>21</sup> In nearly all the states provisions are made

<sup>20</sup> Ante, § 180, and notes; *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Pompton Tp. v. Cooper Union*, 101 U. S. 196, 25 L. Ed. 803; *Menasha v. Hazard*, 102 U. S. 81, 26 L. Ed. 83; *Town of Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. Ed. 323; *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; *Folsom v. Township of Ninety-Six*, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; *Kreger v. Township of Bismarck*, 59 Minn. 3, 60 N. W. 675; *Robinson v. Town of Fowler*, 80 Hun, 101, 30 N. Y. Supp. 25; *Rathbone v. Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674.

<sup>21</sup> In the Dakotas the school district is expressly constituted a body corporate by the provisions of the statutes. In Michigan and Arkansas the courts declare the school district a body corporate, with power to seek relief in equity. *School Dist. No. 3 of Everett Tp. v. School Dist. No. 1 of Wilcox Tp.*, 63 Mich. 51, 29 N. W. 489; *School Dist. No. 3 v. Bodenhamer*, 43 Ark. 140. In Kansas it is de-

for different kinds of school districts, applicable to urban and rural population, and the peculiar method of operation of these quasi corporations depends upon the school statutes enacted in the several states. Generally the organization consists of a board of commissioners or school trustees for each district, chosen by the people, and invested with the power of selecting the teachers for the school or schools of the district, fixing the salary, auditing the teachers' claims therefor, and giving the warrant upon the school fund for paying the same. They are also the custodians of the schoolhouses and other school property of the district, and empowered by law to erect new school buildings when necessary, and to purchase school supplies for their district. The boundaries of the school district are fixed in some states by the legislature, in others by the county government, and yet in others by the town or township government, as the Constitution may provide. The school funds are kept in some states in the county treasury, in others in the town or township treasury, and in others by the treasurer of the school district.

#### *Existence—Management*

It has been held that the existence of a school district may be proved by prescription.<sup>22</sup> All that is necessary in such a case is to show that the district has long been in existence,

clared to be a quasi corporation, and this is the current opinion. *Beach v. Leahy*, 11 Kan. 23. And to the same effect are *People ex rel. Cairo & St. L. R. Co. v. Trustees of Schools*, 78 Ill. 136; *Littlewort v. Davis*, 50 Miss. 403; *School Dist. No. 7 of Wright County v. Thompson*, 5 Minn. 280 (Gil. 221); *School Dist. No. 3 v. Macloon*, 4 Wis. 79; *Wharton v. School Directors of Cass Tp.*, 42 Pa. 358; *Rapelye v. Van Sickler*, 1 Edm. Sel. Cas. (N. Y.) 175. See *Holmes & Bull Furniture Co. v. Hedges*, 13 Wash. 696, 43 Pac. 944.

<sup>22</sup> *Half-way River School Dist. v. Bradley*, 54 Conn. 74, 5 Atl. 861; *Sherwin v. Bugbee*, 16 Vt. 439; *Bassett v. Porter*, 4 Cush. (Mass.) 487; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319.

As to power of school district to issue bonds, see *Holliday v. Hilderbrandt*, 97 Iowa, 177, 66 N. W. 89; *Hamilton v. San Diego County*, 108 Cal. 273, 41 Pac. 305; *Chamberlain v. Board of Education of Cranbury Tp.*, 58 N. J. Law, 347, 33 Atl. 923. Also, *Jamison v.*

and has been publicly known and recognized as such.<sup>23</sup> They have no powers derived from usage, but only the powers expressly granted to organizations of this class, and such implied powers as are necessary to enable them to perform their functions.<sup>24</sup> They may also be given corporate character and status by implication.<sup>25</sup> In determining the question whether the school district, or its officers, possess a particular power under statute, the courts lean towards a strict construction of the law;<sup>26</sup> but, where the power is obviously conferred, such liberal interpretation is given as will further the end in view.<sup>27</sup> School districts must, however, perform their functions in the manner pointed out by law; and so, where the statute requires a written contract, an oral contract cannot be prov-

Independent School Dist. of Rock Rapids, Lyon County, Iowa (C. C.) 90 Fed. 387.

On the subject of organization of school districts, see *State v. Duerr*, 11 Ohio Cir. Ct. R. 303; *Board of Sup'rs of Bedford County v. Bedford High School*, 92 Va. 292, 23 S. E. 299; *School Dist. No. 4 v. Smith*, 90 Mo. App. 215.

<sup>23</sup> *Harris v. School Dist. No. 10*, in *Canaan*, 28 N. H. 58; *Conklin v. School Dist. No. 37*, 22 Kan. 521.

<sup>24</sup> *Wilson v. School Dist. No. 4* in *Chester*, 32 N. H. 118; *Beach v. Leahy*, 11 Kan. 30; *Scales v. Ordinary of Chattahoochee County*, 41 Ga. 225; *Rogers v. People ex rel. Brewer*, 68 Ill. 154.

Where a statute requires that a contract be in writing, a school district cannot be made liable on an implied contract for the value of services of a janitor in sweeping a district schoolhouse and keeping fires therein. *Taylor v. School Dist.*, 1 Mo. App. Rep'r, 98, 60 Mo. App. 372.

<sup>25</sup> 1 *Dill. Mun. Corp.* § 43; *Inhabitants of Fourth School Dist. in Rumford v. Wood*, 13 Mass. 193.

<sup>26</sup> *Rogers v. People ex rel. Brewer*, 68 Ill. 154; *Harris v. School Dist. No. 10*, in *Canaan*, 28 N. H. 58; *Beach v. Leahy*, 11 Kan. 30; *Scales v. Ordinary of Chattahoochee County*, 41 Ga. 225; *Black v. Cornell*, 30 Mo. App. 641; *Weitz v. Independent Dist. of Des Moines*, 79 Iowa, 423, 44 N. W. 696; *Parr v. President, etc., of Village of Greenbush*, 72 N. Y. 463; *Farmers' & Merchants' Nat. Bank of Valley City v. School Dist. No. 53*, 6 Dak. 255, 42 N. W. 767.

<sup>27</sup> *Sanborn v. School Dist. No. 10*, *Rice County*, 12 Minn. 17 (Gil. 1); *Hazen v. Lerche*, 47 Mich. 626, 11 N. W. 413; *White v. School Dist. (Pa.)* 8 Atl. 443; *School Dist. v. Bennett*, 52 Ark. 511, 13 S. W. 132; *State, to Use of Board of Education of Cape Girardeau*, v.

en.<sup>28</sup> Nor is a teacher's contract valid for a greater time than that authorized by statute.<sup>29</sup> In regard to contracts for school supplies, the same general rule prevails as in other corporations. If the directors transgress the limit of their authority in making such a contract, the contract is invalid, and cannot be enforced over the objection of the district.<sup>30</sup> But if supplies or teacher's services have been received and used for the benefit of the school, an action of assumpsit will lie for the value of goods or services so had and received.<sup>31</sup> Ir-

Tiedemann, 69 Mo. 515; McCortle v. Bates, 29 Ohio St. 419, 23 Am. Rep. 758; Sullivan v. School Dist. No. 39, 39 Kan. 347, 18 Pac. 287.

See Singleton v. Austin, 27 Tex. Civ. App. 88, 65 S. W. 686; Kraft v. Board of Education of Weehawken Tp., 67 N. J. Law, 512, 51 Atl. 483; Stevens v. Campbell, 26 Tex. Civ. App. 213, 63 S. W. 161.

<sup>28</sup> Dickinson v. City of Poughkeepsie, 75 N. Y. 65; Weitz v. Independent Dist. of Des Moines, 79 Iowa, 423, 44 N. W. 696; Capital Bank of St. Paul v. School Dist. No. 53, 1 N. D. 479, 48 N. W. 363; School Town of Milford v. Powner, 126 Ind. 528, 26 N. E. 484; Cleveland v. Amy, 88 Mich. 374, 50 N. W. 293; Roseboom v. Jefferson School Tp., 122 Ind. 377, 23 N. E. 796; Black v. Cornell, 30 Mo. App. 641.

A statute provided that contracts with school districts should be in writing. An oral contract with a teacher to conduct the school for a month after the expiration of his written contract was held to be unenforceable, though such teacher had performed the services. Hutchins v. School Dist. No. 1, Colfax Tp., 128 Mich. 177, 87 N. W. 80.

Under a statute providing that no city school township, or school district shall make any contract unless it is in writing and subscribed by the parties, all contracts for the employment of teachers in public schools must be so executed. Wetmore v. Board of Education of City of St. Louis, 86 Mo. App. 362; Faulk v. McCartney, 42 Kan. 695, 22 Pac. 712.

<sup>29</sup> White v. School Dist. (Pa.) 8 Atl. 443; School Com'rs of Washington County v. Wagaman, 84 Md. 151, 35 Atl. 85; Doss v. Wiley, 72 Miss. 179, 16 South. 902; Hill v. Swinney, 72 Miss. 248, 16 South. 497.

But see, contra, School Town of Milford v. Zeigler, 1 Ind. App. 138, 27 N. E. 303.

<sup>30</sup> Middleton v. Greeson, 106 Ind. 18, 5 N. E. 755; School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132; Barry v. Goad, 89 Cal. 215, 26 Pac. 785; School Dist. No. 80 v. Brown, 2 Kan. App. 309, 43 Pac. 102; State v. Freed, 10 Ohio Cir. Ct. R. 294, 3 Ohio Dec. 314.

<sup>31</sup> Davis v. School Dist. No. 1 of Niles, 81 Mich. 214, 45 N. W. 989;

regular or unauthorized contracts may be ratified and validated, either by special resolution of the board or by acquiescence.<sup>82</sup>

#### *Directors*

The board of school directors is constituted by law the general agency for the management of the affairs of the school district. Their powers are generally prescribed in the school law. They have general direction over the schools of the district. In matters of fundamental importance, such as changing the district boundaries or incurring obligations for extraordinary expenses, they are usually required to obtain an expression of popular consent by public election.<sup>83</sup> In

*School Town of Milford v. Pownier*, 126 Ind. 528, 26 N. E. 484; *Hull v. Independent School Dist. of Aplington*, 82 Iowa, 686, 46 N. W. 1053, 10 L. R. A. 273; *Cobb v. School Dist. No. 1 in Pomfret*, 63 Vt. 647, 21 Atl. 957; *Andrews v. School Dist. No. 4, Otter Tail County*, 37 Minn. 96, 33 N. W. 217.

A salesman of school apparatus induced a majority of the school board to sign a contract for the purchase of school supplies. Each member signed the contract separately and without consultation with the others. No deceit was used in obtaining the signatures of the various members. The supplies were accepted and used by the district, and it was sought to charge the district with payment therefor. Held that, even if the circumstances attending the execution of the contract rendered it opposed to public policy, the acceptance and retention of the benefit by the district prevented it from taking advantage of such objection. *Johnson v. School Corp., of Cedar*, 117 Iowa, 319, 90 N. W. 713.

<sup>82</sup> *Trustees of Schools of Tp. 24 v. Trustees of Schools of Tp. 25*, 81 Ill. 470; *Everts v. District Tp. of Rose Grove*, 77 Iowa, 37, 41 N. W. 478, 14 Am. St. Rep. 264; *Norris v. School Dist. No. 1 in Windsor*, 12 Me. 293, 28 Am. Dec. 182; *Rowell v. School Dist.*, 59 Vt. 658, 10 Atl. 754; *Johnson v. School Corp. of Cedar*, 117 Iowa, 319, 90 N. W. 713. See *First Nat. Bank of Morristown v. Felknor* (Tenn. Ch. App.) 48 S. W. 392.

<sup>83</sup> *Black v. Cornell*, 30 Mo. App. 641; *Capital Bank of St. Paul v. School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363; *Gentle v. Board of School Inspectors*, 73 Mich. 40, 40 N. W. 928; *Smith v. Proctor*, 53 Hun, 143, 6 N. Y. Supp. 212; *Briggs v. Borden*, 71 Mich. 87, 38 N. W. 712.

The officers of a school district cannot by contract create a district liability for the building of a schoolhouse, unless first author-

the management of current affairs of the district, however, they are vested with full discretion within the limits of the annual school appropriation.<sup>84</sup> Unless the statute confers the authority upon some other officer or board, it is their duty, besides employing the teacher, to prescribe the curriculum, and adopt the text-books to be used, and purchase the necessary school supplies.<sup>85</sup> They do not possess the implied powers of directors of private corporations,<sup>86</sup> but their regular contracts within the limits of their authority are binding upon the district.<sup>87</sup>

ized to do so, and a site selected, and out of the funds provided for that purpose by the electors of the district. *School Dist. No. 80 v. Brown*, 2 Kan. App. 309, 43 Pac. 102. See *Barrett v. Coleman*, 12 Tex. Civ. App. 663, 35 S. W. 418; *Stadtler v. School Dist. No. 40*, 61 Minn. 259, 63 N. W. 638; *People ex rel. Sackmann v. Keechler*, 194 Ill. 236, 62 N. E. 525. Also, *Hale v. Brown*, 70 Ark. 471, 69 S. W. 260.

As to control of school property, see *Bender v. Streabich*, 17 Pa. Co. Ct. R. 609.

<sup>84</sup> *Jefferson School Tp. v. Litton*, 116 Ind. 467, 19 N. E. 323; *Macklin v. Trustees of Common School-Dist.*, 88 Ky. 592, 11 S. W. 657; *People v. McFall*, 26 Ill. App. 319.

<sup>85</sup> *Hanover School Tp. v. Gant*, 125 Ind. 557, 25 N. E. 872; *Witherrop v. Titusville School Board*, 7 Pa. Co. Ct. R. 451; *Fatout v. Board of School Com'rs*, 102 Ind. 223, 1 N. E. 389; *State ex rel. Flowers v. Board of Education of City of Columbus*, 35 Ohio St. 368; *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N. W. 393; *Campagna v. Calderhead*, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277.

In *State v. Freed*, 10 Ohio Cir. Ct. R. 294, 3 Ohio Dec. 314, it was held that the expression "all the necessary apparatus" did not include philosophical apparatus for the demonstration of different branches of education. See, also, *Honaker v. Board of Education of Pocatalico Dist.*, 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413, 57 Am. St. Rep. 847; *Jones v. School Dist. No. 3 of Iosco*, 110 Mich. 363, 68 N. W. 222; *Butler & Co. v. Shirley Tp. School Dist.*, 15 Pa. Co. Ct. R. 291.

<sup>86</sup> *Cross v. School Directors*, 24 Ill. App. 191; *Shakespear v. Smith*, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327; *Andrews v. School Dist. No. 4, Otter Tail County*, 37 Minn. 96, 33 N. W. 217; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213, 21 N. E. 747.

<sup>87</sup> *Andrews v. School Dist. No. 4, Otter Tail County*, 37 Minn. 96, 33 N. W. 217; *Independent Dist. of Flint River v. Kelley*, 55 Iowa, 568, 8 N. W. 426; *Shankland v. Phillips*, 3 Tenn. Ch. 556; *McCortle*

### OTHER LOCAL QUASI CORPORATIONS

188. Besides counties, towns, townships, and school districts, there are other local organizations created by statute for purely public purposes, not declared to be corporations, and yet possessing sufficient corporate attributes to be characterized as quasi corporations.

¶ The public quasi corporation, from its very nature, is not susceptible of accurate definition. It is almost a corporation for public purposes. ¶ The New England town we have seen to be very nearly a full corporation—the county, township, and school district, in the order mentioned, slightly further removed; and yet all are recognized as distinct entities, entitled to assert their legal rights and incur legal liabilities in corporate capacity and name, cognizable in the courts of the state. Just how near this local agency of government must approximate a municipality—how many corporate characteristics it must have to entitle it to the name of quasi corporation—has been hitherto, and probably will continue to be, left by the courts without exact definition. Just as in the past has been done, so in the future the courts will probably declare such organization a quasi corporation, whenever such declaration is not repugnant to settled law, and is necessary to the attainment of public justice.<sup>38</sup> Thus have been located in this class of legal bodies drainage districts,<sup>39</sup> levee dis-

v. Bates, 29 Ohio St. 419, 23 Am. Rep. 758; Eckhardt v. Darby, 118 Mich. 199, 76 N. W. 761.

<sup>38</sup> 1 Dill. Mun. Corp. (4th Ed.) §§ 9, 25; BOARD OF COM'RS OF HAMILTON COUNTY v. MIGHELS, 7 Ohio St. 109, Cooley, Cas. Mun. Corp. 4; ASKEW v. HALE COUNTY, 54 Ala. 639, 25 Am. Rep. 730, Cooley, Cas. Mun. Corp. 355; Cathcart v. Comstock, 56 Wis. 590, 14 N. W. 833; Hamilton County v. Garrett, 62 Tex. 602; GREEN v. CITY OF CAPE MAY, 41 N. J. Law, 45, Cooley, Cas. Mun. Corp. 99.

<sup>39</sup> Elmore v. Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am.

tricts,<sup>40</sup> and road districts;<sup>41</sup> and to it will doubtless be drawn the public organizations for irrigating particular districts of country. Their corporate functions are few, their objects special, and to their transactions will be found applicable the strict rules and principles of decision applied in cases of townships and school districts in limitation of powers and liabilities.

### 'BOARDS—COMMISSIONERS—COMPANIES

189. A public body of individuals created by law and charged with the performance of some governmental function or functions, whether general or local, constitute a quasi corporation.

In this class of quasi corporations the individuals incorporated, or the members of the body, become the prominent feature, and the locality becomes unimportant or disappears. These agencies of government possess theoretically the following essential attributes of a corporation: (a) A body of individuals; (b) the sanction of the law; (c) the distinct and definite purpose. They are usually called boards, commissions, or trustees, and are charged with the performance of some distinct governmental function, either throughout the entire state or in some particular locality. To this sort of quasi corporations belong overseers of the poor,<sup>42</sup> river con-

St. Rep. 363; Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544.

<sup>40</sup> Dean v. Davis, 51 Cal. 406; People v. Williams, 56 Cal. 647. A levee district which, under statutory provision, may be established by the county court on application of property owners, may be established by such court notwithstanding objection of less than a majority of the landowners; and it is not a private corporation, but a public, political subdivision of the state. Morrison v. Morey, 146 Mo. 543, 48 S. W. 629.

<sup>41</sup> Elliott, Roads & S. p. 325; Board of Com'rs of Montgomery County v. Fullen, 111 Ind. 410, 12 N. E. 298.

<sup>42</sup> Overseers of Poor of City of Boston v. Sears, 22 Pick. (Mass.) 122; Rouse v. Moore, 18 Johns. (N. Y.) 407; Governor v. Gridley,

servators,<sup>48</sup> highway commissioners,<sup>44</sup> boards of education,<sup>45</sup> park commissioners,<sup>46</sup> railroad commissioners,<sup>47</sup> warehouse commissioners,<sup>48</sup> boards of public works,<sup>49</sup> boards of health,<sup>50</sup> police boards,<sup>51</sup> police juries,<sup>52</sup> fire engine companies;<sup>53</sup> and even a governor of a state has been held to be a quasi corporation sole.<sup>54</sup>

These bodies of public officials are generally only administrative agencies of the state. Their governmental functions are limited in extent and clearly defined by statute, and they have no revenues or taxing powers. They are express public trusts to be administered for the public welfare. The property they may hold, being dedicated to public use and service, is exempt from legal process, like other property of the state; and the measure of their corporate liability is the narrow scope of their corporate functions. But occasionally such bodies are empowered to engage in undertakings of a business character, yielding revenue over which they have qualified control. In such cases the field of liability is enlarged, and they become measurably subject to the same rules as are applied to other corporations performing like services. An instance of this kind occurred in the celebrated cases of the Liverpool dock

Walk. (Miss.) 328. See *Town of Cordova v. Village of Le Sueur Center*, 74 Minn. 515, 77 N. W. 290.

<sup>48</sup> *Conservators of River Tone v. Ash*, 10 Barn. & C. 349.

<sup>44</sup> *Levy Court v. Coroner*, 2 Wall. (U. S.) 501, 17 L. Ed. 851.

<sup>45</sup> *State v. Board of Education*, 18 Nev. 173, 1 Pac. 844.

<sup>46</sup> *Andrews v. People ex rel. Rumsey*, 83 Ill. 529; *Id.*, 84 Ill. 28.

<sup>47</sup> *People v. Harper*, 91 Ill. 357.

<sup>48</sup> *Id.*

<sup>49</sup> *Larned v. Briscoe*, 62 Mich. 393, 29 N. W. 22.

<sup>50</sup> *State v. Board of Health of City of Newark*, 54 N. J. Law, 325, 23 Atl. 949.

<sup>51</sup> *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566.

<sup>52</sup> *Police Jury of Parish of Ouachita v. Mayor, etc., of City of Monroe*, 38 La. Ann. 630.

<sup>53</sup> *Cole v. Fire Engine Co. in East Greenwich*, 12 R. I. 202.

<sup>54</sup> *Polk v. Plummer*, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; *Governor v. Allen*, 8 Humph. (Tenn.) 176. As to state universities, see

commission, ultimately decided by the House of Lords, wherein this quasi corporation was not only held subject to pool rates,<sup>55</sup> but liable in damages for negligence in failing to properly cleanse the Wellington Dock, whereby a vessel was imbedded in harbor mud, and, with its cargo, was badly damaged.<sup>56</sup> And in another case want of funds was held no defense to such an action, because the commissioners had power to levy a tax, and thereby obtain the necessary funds.<sup>57</sup> Similar rulings have been made in this country in regard to overseers of highways<sup>58</sup> and to municipal corporations.<sup>59</sup>

State ex rel. Little v. Board of Régents of University of Kansas, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378, and note.

<sup>55</sup> Jones v. Board, 11 H. L. Cas. 443.

<sup>56</sup> Mersey Dock Trustees v. Gibbs, L. R. 1 H. L. 93. This interesting and instructive case is given in full in 1 Thomp. Neg. 581. It is thus digested: "The principle on which a private person or a company is liable for damages occasioned by the neglect of servants applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionally diminished."

<sup>57</sup> Hartnall v. Ryde Commissioners, 4 Best & S. 361.

<sup>58</sup> Hover v. Barkhoof, 44 N. Y. 113.

<sup>59</sup> City of Erie v. Schwingle, 22 Pa. 385, 60 Am. Dec. 87; Hines v. City of Lockport, 50 N. Y. 236; Hyatt v. Trustees of Village of Ron-dout, 44 Barb. (N. Y.) 385; Mayor, etc., of City of Milledgeville v. Cooley, 55 Ga. 17.



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